95-1735

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

October Term, 1995

MANVILLE PERSONAL INJURY TRUST,
Respondent,

v.

JAMES WALKER,
Petitioner.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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A. Whether A Federal Magistrate May Punish Contempt By Entry Of A Substantial Money Judgment That Is Neither Certified To Or Reviewed By An Article III Judge.

B. Whether Failure To Attend A Federal Magistrate's Hearing To Determine Amount Of Contempt Sanctions Constitutes Implied Consent To The Magistrate's Jurisdiction, Or Waiver Of The Right To Challenge Validity Of The Order.

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IV. OPINIONS DELIVERED IN THIS PROCEEDING BY OTHER COURTS

A. *In re Joint Eastern & Southern Districts Asbestos Litigation*, 71 F.3d 1319 (7th Cir. 1995); Exhibit B to Petitioner's Appendix

B. *In re Joint Eastern & Southern Dist. Asbestos Litigation*, 855 F. Supp. 265 (C.D. Ill. 1994); Exhibit F to Petitioner's Appendix

C. *In re Joint Eastern & Southern Districts Asbestos Litigation*, 22 F.3d 755 (7th Cir. 1994); Exhibit G to Petitioner's Appendix

D. *In re Joint Eastern & Southern Districts Asbestos Litigation*, 800 F. Supp. 643 (D.C. Ill. 1992); Exhibit H to Petitioner's Appendix

V. STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on December 12, 1995. The judgment affirmed an Illinois District Court's order directing the clerk of the District Court to disburse to respondent Manville Personal Injury Settlement Trust ("Manville Trust") $97,760.90 of a $100,000.00 bond deposited by petitioner James Walker ("Walker"). The disbursement was ordered to satisfy a "judgment" of contempt against Walker entered by a federal magistrate in New York. The disbursement order of the District Court concluded the contempt collection proceeding initiated by Manville Trust in Illinois. Walker appealed, and the Seventh Circuit affirmed the disbursement order in *In re Joint Eastern & Southern Districts Asbestos Litigation*, 71 F.3d 1319 (7th Cir. 1995), and denied Walker's petition for rehearing and suggestion for rehearing en banc on January 24, 1996. Walker seeks review by writ of certiorari pursuant to 28 U.S.C. § 1254, contending that the federal magistrate's contempt judgments were void.

VI. Constitutional and Statutory Provisions Involved

A. United States Constitution

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States;—between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

B. 28 United States Code §636

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART III. COURT OFFICERS AND EMPLOYEES

CHAPTER 43. UNITED STATES MAGISTRATES

28 USCS § 636 (1995)

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter [28 USCS § 631 et seq.] shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure [USCS FRCP] for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 [18 USCS § 3142] concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code [18 USCS § 3401], in conformity with and subject to the limitations of that section, and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title [28 USCS §§ 1 et seq.] and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts [USCS FRCP Rule 53(b)].

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the contrary—

(1) Upon the consent of the parties, a full-time United States magistrate or a part-time United States magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case, when specially designated to exercise such jurisdiction by the district court or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time magistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 631(b)(1) [28

USCS § 631(b)(1)] and the chief judge of the district court certifies that a full-time magistrate is not reasonably available in accordance with guidelines established by the judicial council of the circuit. When there is more than one judge of a district court, designation under this paragraph shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the parties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to the clerk of court. Thereafter, either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the reference of civil matters to magistrates shall include procedures to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case referred under paragraph (1) of this subsection, an aggrieved party may appeal directly to the appropriate United States court of appeals from the judgment of the magistrate in the same manner as an appeal from any other judgment of a district court. In this circumstance, the consent of the parties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judgment of the district court in accordance with the Federal Rules of Civil Procedure [USCS FRCP]. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district

court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter [28 USCS §§ 631 et seq.], and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpoenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the

district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform. A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635 [28 USCS § 635].

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code [18 USCS § 4107]. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 [18 USCS § 4108] and the appointment of

counsel authorized by section 4109 of title 18, United States Code [18 USCS § 4109], and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 [5 USCS §§ 8331 et seq., 8401 et seq.] which are applicable to such magistrate. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631.

VII. STATEMENT OF THE CASE

In 1982, Johns-Manville Corporation petitioned for reorganization under Chapter 11 of the Bankruptcy Code in the Southern District of New York. Its reorganization plan established the Manville Personal Injury Settlement Trust ("Manville Trust"), to pay full value for all asbestos related claims incurred by Manville. See *Kane v. Johns-Manville Corporation,* 843 F.2d 636 (2d Cir. 1988). Claimants were permitted to sue Manville Trust. On June 14, 1990, the McLean County Circuit Court in Illinois entered judgments in favor of certain plaintiffs and against Manville Trust in the consolidated cases of *Handley v. Manville Corporation Asbestos Disease Compensation Fund* (No. 80 L 93) and *Betts v. Manville Corporation Asbestos Disease Compensation Fund* (No. 79 L 147). Respondent James Walker ("Walker") represented the plaintiffs in both state court actions.

On July 20, 1990, Judge Jack Weinstein, United States District Court, Eastern District of New York, assumed supervisory responsibility over the execution of Manville's confirmed reorganization plan, along with Bankruptcy Judge Burton Lifland. *In re Joint Eastern and Southern Districts Asbestos Litigation,* 129 B.R. 710, 762 (E. and S.D.N.Y. 1991). On November, 23, 1990, Judges Weinstein and Lifland entered an injunction order purporting to restrain asbestos claimants from proceeding against Manville Trust in all jurisdictions, including state court actions, notwithstanding the rights granted in Manville's reorganization plan. *Findley v. Blinken*, 982 F.2d 721 (2d Cir. 1992). The injunction order was entered in a class action suit filed on November 19, 1990 in New York. Neither Walker, nor any of the judgment holders in the *Handley* and *Betts* actions, were named parties in the class action or served with any summons. They did not receive any notice of a request for relief until after the injunction was entered and never appeared in that action. *See,* Walker affidavit, part of the record on appeal to the Seventh Circuit, Exh. I, Petitioner's Appendix ("App."), paragraphs 5-10.

Nevertheless, on April 19, 1991, Judge Weinstein issued a Rule to Show Cause why Walker should not be held in contempt of court for initiating state court citation proceedings against one of Manville Trust's banks. Notice of this hearing in New York was served in Illinois on Walker less than 24 hours before it commenced, and Walker did not appear. Judge Weinstein held Walker in contempt on April 24, 1991. However, he did not punish him, nor did the subsequent written order state there should be punishment. Instead, the District Court referred the matter to:

> . . .the Honorable John L. Caden, United States Magistrate, to determine whether sanctions, *if any*, should be imposed against Walker and, if so, in what amount. The Magistrate has also been asked to determine, *inter alia*, whether further sanctions should be imposed if Walker fails to obey this Court's Order.
>
> App. at Exh. J-4 (Emphasis supplied).

This order was signed only by the Clerk of the Court and failed to state under what authority or section of the Magistrate's Act the District Court's oral referral was under. Magistrate Caden chose to punish Walker for contempt by entering default money judgments against him. The Magistrate's first order was dated May 13, 1991 and entered judgment for $47,168.50 in fees and $4,916.80 in costs. App. at Exh. J-7. This order was never certified to or subsequently acted on *or entered* by a District Court judge. The second order was entered by Magistrate Caden on June 10, 1991, imposing additional fees and costs of $18,504.00 and $4,065.71, respectively, and a fine of $7,000.00. App. at Exh. J-10. This order was also never certified to or subsequently acted on or entered by a District Court judge. Neither of the Magistrate orders were structured as a report or recommendation to a District Court judge.

The "judgment" certified by the Clerk of the District Court for the Eastern District of New York, and enforced by Manville

Trust in the proceedings below, attached the two Magistrate orders as exhibits. App. Exh. J-5 No orders signed by any District Court judge were attached, and the September 3, 1991 "Judgment on Decision by the Court" referred to Magistrate Caden's orders of May 13, 1991 and June 10, 1991 only. The record below indisputably establishes that the "judgment" of $81,655.00 is the product of a clerk's entry and certification of two orders entered by a federal magistrate. District Court Judge Weinstein expressed no opinion on whether Walker should be punished for contempt and never treated Magistrate Caden's orders as recommendations which he later adopted.

Walker did not appear before either the District Court or Magistrate Caden. His consent to magistrate jurisdiction was not requested, nor given. Walker Affidavit, App. at I, par. 11-14.

On October 21, 1991, Manville Trust registered the magistrate's "judgment" in the United States District Court for the Central District of Illinois by filing a certification of judgment from the Clerk of the United States District Court for the Eastern District of New York regarding a judgment entered September 3, 1991. Manville Trust began collection proceedings, including the issuance of garnishment summons and a citation to discover assets. Walker moved, pursuant to Fed.R.Civ.P. 60(b), for a determination that the registered foreign "judgment" was void. Walker requested that the supplementary proceeding be dismissed and the attempted collection quashed. Ultimately, on June 17, 1994, Judge Mills, District Court Judge for the Central District of Illinois, directed the Clerk to disburse to Manville Trust $97,760.90 of the $100,000.00 bond previously deposited by Walker. The remainder of the money was returned to Walker. *See, In re Joint Eastern & Southern Dist. Asbestos Litigation,* 855 F. Supp. 265 (C.D.Ill. 1994), Opinion, App. at F. Walker filed his notice of appeal from this order to the Seventh Circuit Court of Appeals on July 12, 1994, maintaining *inter alia* that absent consent, the Magistrate lacked the power to punish him for

contempt under the Magistrate's Act[1] and Article III of the Constitution.

On December 12, 1995, the Seventh Circuit affirmed the District Court's order requiring Walker to satisfy the Magistrate judgment. *See*, *In re Joint Eastern & Southern Districts Asbestos Litigation*, 71 F.3d 1319 (7th Cir. 1995), App. Exh. B. The panel's[2] decision incorrectly stated the money judgments were entered by the District Court, even though the actual orders prove the opposite:

> The first contempt, which is the basis of the enforcement action now before us, is the judgment of contempt ordered against Mr. Walker by the United States District Courts for the Southern and Eastern Districts of New York ("the Rendering Courts") on September 3, 1991. The Rendering Courts entered judgment on September 3, 1991, ordering a civil sanction of $81,655 plus interest against Mr. Walker, to be recovered by the Manville Personal Injury Settlement Trust ("Manville Trust").
>
> *Id.* at 1320

Thus, the contempt judgment sought to be enforced in this Court is the valid judgment of a district court judge, and there is no reason why the supersedeas bond posted by Mr. Walker cannot be applied in satisfaction of the judgment rendered in favor of the Manville Trust by the Eastern and Southern Districts of New York.

Id. at 1322

Although Walker's briefs stressed that the judgment was entered by the Magistrate only, the panel's mistake, or deliberate gloss over the actual author of the $81,655.00 contempt judg-

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[1]28 U.S.C. § 636

[2]Before Bauer and Ripple, Circuit Judges, and Reynolds, District Judge, sitting by designation. Opinion by Judge Ripple.

ment, enabled it to dispose of Walker's appeal on grounds of waiver. The panel held:

> In our view, an antecedent question, with respect to which we can perceive no ambiguity, affords an ample and principled basis upon which the judgment of the district court ought to be affirmed. As the Manville Trust notes, there can be no doubt that, although he had notice of the proceedings, Mr. Walker never challenged before the Rendering Courts the reference to the magistrate judge. Nor did he ever challenge in that court, or in the reviewing appellate court, the decision of the magistrate judge. Indeed, there was no challenge by Mr. Walker until the collection proceedings were filed in the Central District of Illinois. Even then, Mr. Walker never attempted to initiate review proceedings in the Rendering Courts, despite the district court's expressed preference, initially, for that route.
>
> Under these circumstances, we believe that it is clear that Mr. Walker has waived any objection he might have to the validity of the judgment of the Rendering Courts. Nor do we believe that it can be maintained that the issue ought to be confronted, despite Mr. Walker's obvious waiver, because the issue is "jurisdictional." In our view, such a label is inappropriate. Whatever the authority of the magistrate judge to enter the order in question in the absence of the consent of the parties, Mr. Walker's failure to object gave that consent. See *Peretz v. United States*, 501 U.S. 923, 932-33, 115 L. Ed. 2d 808, 111 S. Ct. 2661 (1991). Nor do we believe that the absence of an Article III judicial officer in these circumstances can be characterized as the sort of "structural protection," id. at 937, that cannot be waived by the litigant. As Judge Easterbrook wrote for the court in an analogous situation, "which judicial officer presides . . . does not affect the court's subject-matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving the dispute. . . . We do not have a 'jurisdictional' problem of the kind that a tribunal must notice even though no party raised the problem. We have at most a mistaken interpretation of a law designating which judicial officer shall preside over the proceedings." *United*

States v. Wey, 895 F.2d 429, 431 (7th Cir.), cert. denied, 497 U.S. 1029 (1990).

Id. at 1323.

Walker's petition for rehearing and suggestion for rehearing en banc was denied on January 24, 1996. App. at Exh. A.

VIII. REASONS FOR THE WRIT

A. A Federal Magistrate May Not Punish Contempt By Entry Of A Substantial Money Judgment That Is Neither Certified To Or Reviewed By An Article III Judge.

Both this Court's opinion in *Peretz v. United States*, 501 U.S. 923 (1991) and the decision in *United States v. Wey*, 895 F.2d 429 (7th Cir. 1990) dealt with the *propriety* of a District Court *reference* to a Magistrate under the *"additional duties"* clause contained in §636(b) of the United States Magistrate's Act.[3] It is critical to those decisions that the Magistrates did not enter any judgment against the defendants, but merely presided over jury selection. *See, Peretz*, 501 U.S. at 925: (The Magistrate conducted voir dire of the jury, which defendant's counsel affirmatively consented to, but the District Court presided over the actual trial.), and *Wey*, at 431: ("Which judicial officer presides *during jury selection* does not affect the court's subject matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving this dispute. *The judgment (that is, the sentence) of the district court concerns a federal crime and is binding.*")[4] In contrast, this case deals with the *power* of a federal

[3]28 U.S.C. § 636(b)(3).

[4]The italics reflect portions of the *Wey* opinion that were left out from the Seventh Circuit's quote of that decision to support its conclusion that the errors raised in Walker's appeal were not jurisdictional. 71 F.3d 1319, at 1323. When the italics are added back in and the quote is read unaltered, it is clear that Judge Easterbrook was referring to a Magistrate's power to preside over jury selection when a party consented, *as long as the District Court enters the final judgment.* The panel's surgery on Easterbrook's comment in *Wey* completely changes its meaning.

magistrate to enter a final, substantial money judgment punishing contempt, and whether such an order must be set aside as void for lack of subject matter jurisdiction.

Neither *Peretz* nor *Wey* have anything to do with the principle raised, and endangered, by the panel's ruling in this case. They do not involve final orders of a Magistrate. In each of those cases, the District Court referred voir dire to the Magistrate under § 636(b)(3) of the Magistrate Act, and the District Court later entered final judgments. Here, it was never stated what section District Court Judge Weinstein relied on in referring contempt sanctions to Magistrate Caden, but it cannot possibly involve § 636(b)(3), as all orders under that section must be finally entered by a District Court. *Rajaratnam v. Moyer*, 47 F.3d 922, 924, and n.6 (7th Cir. 1995). Since Magistrate Caden's orders were not certified to the District Court, they are not validated under § 636(b)(3).

Moreover, no decisions support delegating contempt punishment to Magistrates under any section of 636(a) or (b). Indeed, those that involve powers similar to contempt sanctions construe these sections narrowly. The Seventh Circuit held a Magistrate could not enter an independent, final order of Rule 11 sanctions under any subsection of 636(a) or (b). *Alpern v. Lieb*, 38 F.3d 933, 934-935 (7th Cir. 1994). *Balachandran v. Moyer*, 47 F.3d 922 (7th Cir. 1995) also applied *Alpern* to a Magistrate's order denying an award of attorneys' fees. In that decision the Seventh Circuit determined that applications for attorneys' fees could not be independently decided by a Magistrate under the 636(b)(1) pretrial matters section or the 636(b)(3) additional duties clause. *Id.* at 923-924. *See* also, *Olympia Hotels Corporation et al v. Johnson Wax Development Corp. et al*, 908 F.2d 1363 (7th Cir. 1990)(additional duties section does not authorize Magistrate to conduct voir dire in a civil trial).

Certainly, Magistrate Caden's final orders were not authorized under § 636(e)[5] of the United States Magistrate's Act. That section does not permit a magistrate to punish contempt even when the contumacious conduct occurs before the Magistrate. In such circumstances, the Magistrate can only certify the facts of the incident to the District Court. Until the decision in this case, every Circuit Court of Appeals held that § 636(e) prohibited Magistrates from entering final judgments punishing contempt. *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1044 (7th Cir. 1984) ("[U]nder no aspect of the Magistrate Act can a magistrate punish for contempt."); *United States v. Ritte*, 558 F.2d 926, 927 (9th Cir. 1977); *Proctor v. The State Government of North Carolina*, 830 F.2d 514 (4th Cir. 1987); *Taberer v. Armstrong World Industries, Inc.*, 954 F.2d 888 (3rd Cir. 1992) (Magistrate not authorized to conduct a contempt hearing on a rule to show cause and District Court must conduct a de novo "hearing" as opposed to a de novo "determination"); *Bennett v. General Caster Service et al*, 976 F.2d 995, 998 n.7, (6th Cir. 1992) ("We note that Congress specifically withheld from magistrate judges jurisdiction over contempt proceedings. See 28 U.S.C. § 636(e)."); *United States v. Cargo*, 783 F.2d 507, 509 (5th Cir. 1986)("Under 28 U.S.C. § 636(e)(5)(1982), a magistrate must certify to the district court the facts surrounding the contempt charge.").[6]

The conflict created by the decision in this case and the remaining Circuits is dramatic. For instance, in *Taberer v. Armstrong*

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[5]*See*, page xi, herein.

[6]*See* also *FDIC v. Legrand*, 43 F.3d 163 (5th Cir. 1995) where a motion for contempt for failure to turn over tax returns was referred under § 636(b)(3), but only for a report and recommendation to the District Court. While the circuits disagree over the scope of § 636(b) and whether § 636(e) permits any delegation of contempt matters under § 636(b), that question need not be resolved here as § 636(b) requires the District Judge to enter the final order. Since no District Court in these proceedings entered any order assessing Walker a fine for contempt, § 636(b) cannot be invoked. The authority for Magistrate Caden's final orders must come from somewhere else, such as § 636(c).

World Industries, Inc., 954 F.2d 888 (3rd Cir. 1992), the Third Circuit held that whereas matters under § 636(b)(1)(C) require the District Judge to make a de novo *determination*, § 636(e) requires the District Judge to conduct a de novo *hearing* regarding contempt matters. In *United States v. Raddatz*, 447 U.S. 667 (1980), this Court distinguished a de novo determination from a de novo hearing. A de novo determination requires the District Judge to "consider the record which has been developed before the magistrate and make his own determination on the basis of that record, without being bound to adopt the findings and conclusions of the magistrate." 447 U.S. at 675. In contrast, a de novo hearing entails a new proceeding at which the decision is based solely on the evidence freshly presented at the new proceeding. *Id.* at 673-676.

If contempt is involved, the Third Circuit does not permit a District Court to rely on the record before the Magistrate. The District Court Judge must create its own record by holding a new hearing. However, the Seventh Circuit has now decided that a Magistrate may punish contempt on his own, by entering a substantial fine, and the District Court's failure to review and/or adopt the judgment, much less hold a new hearing, has no bearing on the enforceability of the judgment.

The only section of the Magistrate's Act which could conceivably legitimize the judgment enforced in this case is § 636(c)[7], since it normally permits a Magistrate to enter a final and appealable judgment *if all parties expressly consent. New York Chinese TV Programs, Inc. vs. U.E. Enterprises, Inc.*, 996 F.2d 21, 25 (2d Cir. 1993); *Stanley v. Amoco Oil Co.*, 965 F.2d 203, 204 (7th Cir. 1992) ("in the absence of consent, review of a magistrate judge's decision lies in the district court"); *Colorado Bldg. & Constr. Trades Council v. B.B. Andersen Constr. Co.*, 879 F.2d 809, 811 (10th Cir. 1989)(magistrate judge not authorized to render final

[7]*See*, p. ix herein.

decisions under 28 U.S.C. § 1291 absent both designation by District Court and consent of parties under 28 U.S.C. § 636(c)).

However, § 636(e)'s specific restrictions on a Magistrate's contempt powers, raise substantial doubts as to whether Congress intended § 636(c) to authorize Magistrates to enter final contempt judgments, even with consent.[8] Assuming the record below could establish consent, the Seventh Circuit's decision in this case also conflicts with the Fourth Circuit in *Proctor v. The State Government of North Carolina*, 830 F.2d 514 (4th Cir. 1987). In *Proctor*, all parties consented to the trial of their case before a Magistrate under § 636(c). Upon finding that a consent order was violated, the Magistrate, pursuant to § 636(e), certified the facts to the District Court, and the District Court entered a judgment of civil contempt. On appeal, the Fourth Circuit vacated the judgment, holding that the District Court applied the wrong standard in considering the facts certified to him by the Magistrate. It was error to apply the standard of review under § 636(c), because § 636(e) ". . . provides a different review procedure for contempts . . ." *Id.* at 517. Notwithstanding the consent under § 636(c), the Magistrate was still obliged to certify facts to the District Court, and the District Court was not bound by the record developed before the Magistrate or his findings. *Id.*

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[8]There is only one reported case holding that the parties' consent to try a case before a Magistrate encompasses civil contempt matters. *Miami Valley Carpenters District Council Pension Fund et al v. Scheckelhoff*, 123 F.R.D. 263 (S.D. Ohio 1988). This decision was entered by a Magistrate and has not been followed in any other reported cases. Both Illinois and New York Magistrates believe § 636(e) generally prohibits them from issuing final orders regarding contempt matters, notwithstanding § 636(c). *See, NLFC, Inc. v. Devcom Mid America, Inc.*, 1994 U.S. Dist. LEXIS 6245; *Bank Hapoalim, v. American Home Assurance Company et al*, 1993 U.S.Dist. LEXIS 15349, note 1; *See also, Stotts v. Quinlan*, 139 F.R.D. 321 (E.D. N.C. 1991); *Cook v. Rockwell International Corporation et al*, 907 F. Supp 1460 (Dist. Ct. Colo. 1995); *In re Kitterman*, 696 F.Supp. 1366 (Dist. Ct. Nev. 1988), and *Proctor v. The State Government of North Carolina*, 830 F.2d 514 (4th Cir. 1987).

Without addressing the Fourth Circuit's decision in *Proctor*, or the Third Circuit's holding in *Taberer*, the Seventh Circuit empowered Magistrates to independently enter final contempt judgments and created a conflict with at least two other Circuits regarding the scope of § 636(e).

B. Failure To Attend A Federal Magistrate's Hearing To Determine Amount Of Contempt Sanctions Is Not Implied Consent To The Magistrate's Jurisdiction, Or Waiver Of The Right To Challenge Validity Of The Order.

Additionally, the panel's holding that Walker "consented" to the Magistrate's jurisdiction because he failed to travel across the country to object, is contrary to the standard applied in consensual proceedings under § 636(c). The panel stated: "Whatever the authority of the magistrate judge to enter the order in question in the absence of the consent of the parties, Mr. Walker's failure to object gave that consent." 71 F.3d at 1323. But for this case, the Circuits appear unanimous that "consent" under § 636(c) must be expressly stated on the record and cannot be inferred from silence or conduct. *Fowler v. Jones, et al.*, 899 F.2d 1088, 1092-1093 (11th Cir. 1990)(waiver argument rejected; consent to magistrate must be express, ". . . the waiver approach does violence to Congress' specification in § (c) that trial before a magistrate must be predicated upon express consent." . . . ". . . the fact that Mr. Fowler failed to object to the arrangement set forth by the magistrate is no substitute for the express consent required . . ." *Id.* at 1092.); *Caprera et al vs. Jacobs*, 790 F.2d 442, 445(5th Cir. 1986) (consent must be explicit, cannot be inferred from conduct; consent is jurisdictional and may not be waived by failure to raise at an earlier stage; FRCP 60(b) motion granted); *New York Chinese TV Programs, Inc. vs. U.E. Enterprises, Inc. et al.*, 966 F.2d 21, 24-25 (2d Cir. 1993) (consent must be clear and express, voluntary, and in writing); *EEOC v. West Louisiana Health Services, Inc.*, 959 F.2d 1277 (5th Cir. 1992)(only after

judgment entered against intervening party by Magistrate, did that party object to jurisdiction for lack of consent; court vacated judgment, holding party's silence did not constitute a waiver, and her lack of express consent on the record destroyed jurisdiction); *Adams vs. Heckler*, 794 F.2d 303 (7th Cir. 1986); *Geaney et al vs. Carlson et al*, 776 F.2d 140 (7th Cir. 1985)("Because of constitutional overtones, courts are reluctant to imply consent to the magistrate's authority from a party's conduct"); *Ambrose v. Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984)("no clear and unambiguous statement in the record indicating that the parties consented"); *Trufant v. Autocon, Inc.*, 729 F.2d 308, 309 (5th Cir. 1984)("consent must be explicit, and will not be casually inferred from the conduct of parties"); *Alaniz v. California Processors, Inc.*, 690 F.2d 717, 720 (9th Cir. 1982)("clear and unambiguous expression of consent is required.").

This Court's decision in *Peretz v. United States*, 501 U.S. 923 (1991) lends no support to the Seventh Circuit's radical concept that "consent" under § 636(c) may be implied or waived through conduct, or that a Magistrate's power to enter a final judgment punishing contempt is not "jurisdictional" in the sense that it can never be waived. First, *Peretz* never dealt with the power of a Magistrate to enter a final judgment, much less a contempt judgment. It did not involve the interpretation of "consent" under § 636(c), but instead dealt with the District Court's reference of jury selection proceedings to a Magistrate under § 636(b)(3)—the "additional duties" clause of the Act. At the time of the reference, this Court observed that ". . . the District Judge asked if there was any objection to picking the jury before a magistrate? . . . Petitioner's counsel responded: 'I would love the opportunity.' " Jury selection commenced and the Magistrate again asked if the clients consented; she was assured they had. *Id*. at 925. Significantly, the District Court Judge thereafter presided at the jury trial—not the Magistrate. No objection was raised regarding the Magistrate's supervision of voir dire until after Petitioner was

convicted. Petitioner objected to the Magistrate reference for the first time on appeal. *Id.* This Court held that Petitioner's objection to the reference was foreclosed because he affirmatively welcomed it at trial and his consent was express and on the record. In so holding, this Court carefully distinguished a party's consent to a Magistrate supervising jury selection, which remained under the District Court's close control, as opposed to a complete transfer of power to the Magistrate, as occurred in this case. *Id.* at 937. Although *Peretz* discussed the possibility of waiving rights which are not jurisdictional, or go to the power of a court, it did not reach that issue, since Petitioner was represented at the trial, expressly consented to the Magistrate reference, and the District Court presided over the trial instead of the Magistrate.

The Seventh Circuit stands alone in interpreting *Peretz* as mandating a party to travel to a foreign jurisdiction and object to a Magistrate's power to enter a *final* judgment, or waive the right to attack the judgment when registered for enforcement. No other Circuit has even applied *Peretz* to a situation requiring express consent under § 636(c) as opposed to § 636(b).[9] The Fifth Circuit in *Equal Employment Opportunity vs. West Louisiana*, 959 F.2d 1277, 1281-1282 (5th Cir. 1992) considered such an argument and ruled opposite of the Seventh Circuit, holding that the matter

[9]In *Clark v. Poulton*, 963 F.2d 1361 (10th Cir. 1992), the Tenth Circuit's opinion referred to *Peretz* and later stated the broad proposition that ". . . a magistrate judge's lack of statutory authority is not a jurisdictional defect, so any objection is waived if not raised." *Id.* at 1367. But, the facts of that case were limited to proceedings under § 636(b)—not § 636(c), and the District Court held a de novo review of the record and entered judgment. *Id.* at 1362. Nevertheless, such a broad statement may lead to further disagreement among the Circuits on whether, and in what instances, lack of statutory authority under the Magistrate's Act is procedural or jurisdictional and not subject to waiver. Petitioner submits that at least in the situation where a Magistrate's judgment is not reviewed or subsequently adopted by the District Court, the question of statutory authority is clearly jurisdictional. This is an easier proposition than the status of a Magistrate's authority if the District Court Judge subsequently enters the judgment that is enforced.

of a party's consent to a Magistrate's jurisdiction is not a "procedural" question that can be waived, but is jurisdictional and may be raised at any time. The Fifth Circuit noted specifically that *Peretz* did not control:

> In *Peretz v. United States*, 115 L.Ed. 2d 808, 111 S. Ct. 2661, 2667 (1991), the Court permitted the magistrate to preside over jury selection where the defendant's counsel, "rather than objecting to the Magistrate's role, affirmatively welcomed it." We note that both of those cases refer to reference under section 636(b), whose language, unlike that of section 636(c), does not explicitly require the parties' consent. Nothing in those opinions indicates that the Court would conclude that failure to obtain the parties' explicit consent to reference to the magistrate for trial and entry of judgment under section 636(c) is a procedural error subject to waiver.
>
> 959 F.2d at 1282, note 4.

In *Henry v. Tri-Services, et al*, 33 F.3d 931 (8th Cir. 1994) the Eighth Circuit vacated a Magistrate's judgment of $1,200,000 in damages against all the defendants because a foreign corporation had not appeared and never consented to jurisdiction under § 636(c). The Court held that the record contained no clear statement that the foreign corporation ratified or consented to trial before the Magistrate, so notwithstanding the consent of the other defendants, there was no final order to appeal to the Court of Appeals. The Seventh Circuit turns this principle upside down. It holds in this case that Walker's failure to appeal the Magistrate's order constitutes a waiver to attack its validity. 71 F.2d 1322. This truly is absurd, since every Circuit, including the Seventh, previously recognized that a Magistrate's order is not appealable unless there is express consent that the Magistrate enter a final judgment. *See*, cases cited on p. 9, *infra*.

The Third Circuit's opinion in *Virgin Islands v. Raymond Williams*, 892 F.2d 305 (3rd Cir. 1989), approved by this Court in *Peretz*, acknowledged that the issue of consent is jurisdictional

and not subject to waiver, *even when references under § 636(b) are involved.* "We find little difficulty in concluding that the claim advanced by Williams is jurisdictional in nature, and thus is immunized from the general rule of waiver." *Id.* at 309. This Court also recognizes that "... a challenge to a court's power to adjudicate ... may be raised at any time." *International Longshoremen's Association AFL-CIO vs. Davis,* 476 U.S. 380, 381-382 (1986).

Consequently, Walker could challenge the enforcement of Magistrate Caden's judgment in Illinois pursuant to Federal Rule of Civil Procedure 60(b). Until now, it was established in the Seventh Circuit that the subject matter jurisdiction of the rendering court could be challenged under FRCP 60(b). *United States of America v. Indoor Cultivation Equipment et al,* 55 F.3d 1311 (7th Cir. 1995); *Griffith et al v. Sealtite Corporation,* 903 F.2d 495 (7th Cir. 1990). The Seventh Circuit's new rule collides with these decisions, the cases from other Circuits discussed above, and the Second Circuit, where Magistrate Caden's judgment was entered. *See, Collins v. Foreman,* 729 F.2d 108, 111 (2d Cir. 1984), where the court held that a rule 60(b)(4) motion may be brought at any time to collaterally attack a Magistrate's jurisdiction.

C. Constitutional Implications

The extreme position staked out by the Seventh Circuit must be reeled in by this Court. If § 636 authorizes Magistrates to enter final judgments punishing contempt, at least without explicit consent, then § 636 is unconstitutional under Article III. Setting aside the contempt prohibition in § 636(e), the delegation of final decision making authority to a Magistrate must rest on the requirement of explicit and express consent of all the parties pursuant to § 636(c). The voluntary, express consent requirement is recognized as the linchpin of § 636(c)'s constitutionality and a critical limitation on the expanded jurisdiction of Magistrates. *Gomez v. United States,* 490 U.S. 858, 870 (1989); *Geras v. Lafayette Display Fixtures, Inc.,* 742 F.2d 1037 (7th Cir. 1984); *Lehman*

Bros. Kuhn Loeb, Inc. v. Clark Oil & Refining Corp., 739 F.2d 1313 (8th Cir. 1984), cert. den., 469 U.S. 1158; *Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537 (9th Cir. 1984), cert. den., 469 U.S. 824.

The Seventh Circuit's equivocation of express consent under § 636(c) with a party's absence cannot pass constitutional muster. Up until this decision, the Seventh Circuit acknowledged that concern. In *Mark I. Inc. v. Gruber*, 38 F.3d 369 (7th Cir. 1994) Judge Easterbrook cautioned:

> Magistrate judges may conduct civil trials and enter final judgments, if all of the parties consent. 28 U.S.C. § 636(c); *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984). Because this procedure entails a trial without judicial-independence guarantees of Article III, the litigants' consent must be voluntary and explicit. *Geaney v. Carlson*, 776 F.2d 140, 142 (7th Cir. 1985). Passive acquiescence in a decision made by others does not suffice. *Silberstein v. Silberstein*, 859 F.2d 40, 42 (7th Cir. 1988). Unlike some courts, e.g., *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.*, 996 F.2d 21 (2d Cir. 1993), we do not insist that the consent be in writing, but it must be on the record and unequivocal. *King v. Ionization International, Inc.*, 825 F.2d 1180, 1185 (7th Cir. 1987); *Lovelace v. Dall*, 820 F.2d 223, 226 (7th Cir. 1987). Unless each litigant expressly assents, the case must be tried by a district judge.
>
> 38 F.3d at 370.
>
> —for unless we overrule the cases holding that express assent on the record is essential, one's thoughts do not satisfy § 636(c). Consent to trial and final decision by a magistrate waives several constitutional rights. Waivers should be explicit and on the record.
>
> *Id.* at 371.

In his concurrence, Circuit Judge Wellford observed:

> This circuit has a very strict rule with respect to required consent of a party before a magistrate judge may enter a

> valid final judgment as to that party's interests. In *Jaliwala v. United States*, 945 F.2d 221 (7th Cir. 1991), this court went so far as to dismiss an appeal in a judgment exceeding $160,000,000 because an intervenor party had not consented orally or in writing to trial by the magistrate judge.
>
> *Id.* at 372.

IX. CONCLUSION

In light of the increasing use of Magistrates in our federal judicial system,[10] the boundaries of their power must be marked. The Circuits now disagree on whether a Magistrate can enter a final judgment punishing contempt, even with consent of the parties. The Circuits also disagree on whether the power of a Magistrate to enter a final judgment is jurisdictional or merely procedural. The decision of the Seventh Circuit in this case represents the extreme view that a Magistrate may enter a final judgment of contempt, even if a party does not consent on the record to the Magistrate's jurisdiction. Petitioner submits that such power is not authorized under the Magistrates' Act. If it is, the Magistrate's Act is an unconstitutional delegation of judicial power in violation of Article III. Under either alternative, the Seventh Circuit's decision in this case should not be permitted to stand. For the reasons stated herein, Petitioner requests that this Court grant the writ.

Respectfully submitted,
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[10] *Gomez v. United States*, 490 U.S. 858, 871 (1989).

No.

IN THE

Supreme Court of the United States

October Term, 1995

MANVILLE PERSONAL INJURY TRUST,

Respondent,

v.

JAMES WALKER,

Petitioner.

Appendix to
Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

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IN RE JOINT EASTERN & SOUTHERN DISTRICTS ASBESTOS LITIGATION
IN THE MATTER OF: JOHNS-MANVILLE CORPORATION, et al., Debtors.
BERNADINE K. FINDLEY, as Executrix of the Estate of HILLIARD FINDLEY, et al., Plaintiffs,
v. DONALD M. BLINKEN, et al., Defendants.
APPEAL OF: JAMES WALKER
No. 94-2661

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
1996 U.S. App. LEXIS 1046
January 24, 1996, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 91 M 66. Richard Mills, Judge.

Original Opinion of December 12, 1995, Reported at: 1995 U.S. App. LEXIS 35069.

COUNSEL: JAMES WALKER, Pro se, Bloomington, Il.

For MANVILLE PERSONAL INJURY SETTLEMENT TRUST, Appellee: Christopher Q. King, Gregory R. Naron, SONNENSCHEIN, NATH & ROSENTHAL, Chicago, IL. Steven H. Frankel, SONNENSCHEIN, CARLIN, NATH & ROSENTHAL, San Francisco, CA. Elena Z. Kezelis, Springfield, IL.

JUDGES: Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge, Hon. JOHN W. REYNOLDS, District Judge *

* The Honorable John W. Reynolds, District Judge for the Eastern District of Wisconsin, is sitting by designation.

OPINION: ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed on January 5, 1996 by James Walker, no judge in active service has requested a vote thereon, and all the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

IN RE JOINT EASTERN & SOUTHERN DISTRICTS ASBESTOS LITIGATION

IN THE MATTER OF: JOHNS-MANVILLE CORPORATION, et al., Debtors.
BERNADINE K. FINDLEY, as Executrix of the Estate of HILLIARD FINDLEY, et al., Plaintiffs,
v. DONALD M. BLINKEN, et al., Defendants.
APPEAL OF: JAMES WALKER
No. 94-2661

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
71 F.3d 1319; 1995 U.S. App. LEXIS 35069
April 18, 1995, Argued
December 12, 1995, Decided

SUBSEQUENT HISTORY:
Rehearing and Suggestion for Rehearing En Banc Denied January 24, 1996, Reported at: 1996 U.S. App. LEXIS 1046.

PRIOR HISTORY: Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 91 M 66. Richard Mills, Judge.

COUNSEL: JAMES WALKER, Pro se, Bloomington, Il. For MANVILLE PERSONAL INJURY SETTLEMENT TRUST, Appellee: Christopher Q. King, Gregory R. Naron, SONNENSCHEIN, NATH & ROSENTHAL, Chicago, IL. Steven H. Frankel, SONNENSCHEIN, CARLIN, NATH & ROSENTHAL, San Francisco, CA. Elena Z. Kezelis, Springfield, IL.

JUDGES: Before BAUER and RIPPLE, Circuit Judges, and REYNOLDS, District Judge. *

* The Honorable John W. Reynolds, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.

OPINION BY: RIPPLE

OPINION: RIPPLE, Circuit Judge. James Walker appeals the judgment of the district court enforcing a judgment of contempt rendered by the United States District Courts for the Southern and Eastern Districts of New York. Mr. Walker previously had refused to pay the New York judgment and had been held in contempt by the Illinois district court for his refusal. That court later required that the supersedeas bond previously posted by Mr. Walker to obtain a stay of the Illinois contempt be applied to the satisfaction of the New York judgment. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I. BACKGROUND:

The lengthy and convoluted history of this case has been documented in our previous opinion, *In re Joint Eastern & Southern Districts Asbestos Litigation*, 22 F.3d 755 (7th Cir. 1994) ("Walker I"). We therefore assume familiarity with that opinion. We limit the following rendition to those matters necessary to orient the reader to the precise issue before the court at this juncture. As we explained in detail in Walker I, there are two contempt judgments involved in this case. We therefore deal with what the district court termed "a contempt on contempt." *In re Joint Eastern & Southern Dists. Asbestos Litig.*, 855 F. Supp. 265, 265 (C.D. Ill. 1994). We set forth the basic facts with respect to each.

The first contempt, which is the basis of the enforcement action now before us, is the judgment of contempt ordered against Mr. Walker by the United States District Courts for the Southern and Eastern Districts of New York ("the Rendering Courts") on September 3, 1991. The Rendering Courts entered judgment on September 3, 1991, ordering a civil sanction of $81,655 plus interest against Mr. Walker, to be recovered by the Manville Personal Injury Settlement Trust ("Manville Trust"). The sanction was

imposed because Mr. Walker had interfered with the disposition of funds set aside by the Manville Trust to pay asbestos claimants, some of whom were represented by Mr. Walker. After determining that Mr. Walker was in contempt because of his initiation of state court proceedings in defiance of the court's order, the Rendering Courts directed:

> Remand the case, respectfully, to the Magistrate to determine all legal costs and expenses of the Bank and the Manville Trust and direct whether such expenses should be assessed against the contemnor [James Walker].
>
> The Magistrate shall also consider whether these contemptuous acts should be referred to the disciplinary committee in Illinois that has jurisdiction over Mr. Walker. Tr. (show cause hearing, Apr. 23, 1991) at 3, 5. The subsequent written order, entered over the signature of the clerk of the court, contained the following directive:
>
> With respect to sanctions, this matter has been referred to the Honorable John L. Caden, United States Magistrate, to determine whether sanctions, if any, should be imposed against Walker and, if so, in what amount. The Magistrate has also been asked to determine, inter alia, whether further sanctions should be imposed if Walker fails to obey this Court's order. Judgment of Civil Contempt of James Walker, April 24, 1991, at 3. Although this order appears to be broader than the district court's verbal directive, Mr. Walker never objected to its contents. Nor did he object to the proceedings before the magistrate judge or take any appeal from the magistrate's order fixing the penalty for contempt. The judgment of the Rendering Courts, moreover, was not appealed to the United States Court of Appeals for the Second Circuit.

The second contempt arose out of the attempt of the Manville Trust to collect the judgment of contempt through collection proceedings in the Central District of Illinois. On October 21,

1991, the Manville Trust registered the New York judgment in the United States District Court for the Central District of Illinois for the purpose of collection. See 28 U.S.C. § 1963. It then began collection proceedings against Mr. Walker. Mr. Walker refused, however, to cooperate at the hearing on the citation to discover assets. He again refused to comply at a show cause hearing. After a hearing, the district court held Mr. Walker in civil contempt for refusing to answer questions. See *In re Joint Eastern & Southern Dists. Asbestos Litig.*, 830 F. Supp. 1153, 1155 (C.D. Ill. 1993). In light of Mr. Walker's past conduct, the court considered the sanction of imprisonment appropriate. It sentenced Mr. Walker to imprisonment conditioned on cooperation with the Manville Trust in the discovery of Mr. Walker's assets. When Mr. Walker appealed that decision, the district court stayed his sentence of imprisonment upon the posting of the $100,000 supersedeas bond. Mr. Walker did file the bond in the district court, and then appealed to this court.[1]

In Walker I, we dismissed Mr. Walker's appeals for want of appellate jurisdiction. The first appeal was from a denial, without prejudice, of Mr. Walker's motion for dismissal of the judgment of contempt entered against him by the Rendering Courts. Noting the procedural posture of the enforcement action at the time the appeal came to us, we held that, "as a general rule, an order authorizing discovery in aid of execution of judgment is not

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[1]When he posted the supersedeas bond, Mr. Walker filed in the district court this statement along with his deposit of $100,000:

Therefore, the condition of this $100,000 bond shall be for the prosecution of the appeal and the appearance of Mr. Walker to submit to the Marshall [sic] to be taken into custody or to answer questions in compliance with the Citation to Discover Assets and the Court's order of September 14, 1993, in the event the order is affirmed or the appeal dismissed. If the judgments which are the subject of this action are satisfied or if the order of September 14, 1993, is reversed, then this obligation shall be void, and the $100,000 bond money shall be returned to James Walker. Statement re Supersedeas Bond, filed Sept. 16, 1993.

appealable until the end of the case." *Walker*, 22 F.3d at 760. We noted that neither the district court nor Mr. Walker regarded the court's ruling as a final disposition of the matter. Indeed, the district court had deferred to the Rendering Courts with respect to Mr. Walker's contention that the underlying judgment of the Rendering Courts was not valid, and we held that this decision also was not appealable. We wrote that that decision "is most realistically viewed as a decision of sound judicial administration rather than as a juridical act having the consequences of finality that require further review by an appellate tribunal." Id. at 763. It was not a final judgment, but rather a "common-sense decision that is consonant with the usual approach of district courts asked to review the judgment of another district now registered for purpose of collection." Id. at 764.

The second appeal in Walker I, which we also dismissed for want of finality, was of the district court's civil contempt ruling against Mr. Walker. Following established case law, we held that an order of civil contempt is generally not a final decision for purposes of § 1291, *Powers v. Chicago Transit Authority*, 846 F.2d 1139, 1141 (7th Cir. 1988), and that "an order of civil contempt enforcing a discovery order in supplementary proceedings" is likewise unappealable, *Resolution Trust Corp. v. Ruggiero*, 987 F.2d 420, 421 (7th Cir. 1993) (per curiam). 22 F.3d at 764. As a result, we dismissed both appeals for lack of appellate jurisdiction.

Following our dismissal of the appeals, the Manville Trust filed a motion in the district court requesting that the court enter an order requiring the execution on the $100,000 supersedeas bond deposited with the court by Mr. Walker on September 16, 1993. In its motion, the Manville Trust stated that it had "made demand on Walker for payment of the judgment," and that it was "entitled, toward satisfaction of the unsatisfied judgment against Walker it registered in [the Illinois District Court], to execute on the supersedeas bond posted by Walker." Manville Trust's

Motion for Execution on Bond, at 2. The Manville Trust specifically sought the disbursement of $97,474.26, with accrued interest on that amount of $16.11 per day after May 23, 1994, from the supersedeas bond posted by Mr. Walker. *Id.* at 3.

The district court granted the motion on June 16, 1994. It ordered disbursement of $97,760.90 to the Manville Trust, in care of the attorney of record, and the balance to James Walker's attorney. In its opinion, although it had previously deferred to the Rendering Courts on the validity of the underlying judgment, the district court considered Mr. Walker's objection to the motion of the Manville Trust and determined that it was without merit. Mr. Walker had submitted that the New York judgment was void and unenforceable under 28 U.S.C. § 636(e) because it was imposed by a magistrate judge instead of a district judge. The district court first rejected the legal ground upon which Mr. Walker based his assertion: 28 U.S.C. § 636(e) applies to situations in which a person commits an act of contempt before a magistrate judge. That is not what happened in this case. Here, Mr. Walker had violated two injunctive decrees of the Rendering Courts prohibiting further litigation against the assets of the Manville Trust, and the Rendering Courts directed Mr. Walker to appear at a show cause hearing to explain his disobeyance of those courts' orders. *In re Joint Eastern & Southern Dists. Asbestos Litig.*, 855 F. Supp. at 266. The court then summarized the proceedings before the Rendering Courts in New York that led to the New York judgment of civil contempt against Mr. Walker, correcting Mr. Walker's erroneous factual assertions. The court noted that the district judge, and not the magistrate judge, had adjudged Mr. Walker to be in civil contempt, and then had referred the matter to the magistrate judge for a determination of the amount of sanctions to be assessed against Mr. Walker for his civil contempt. The district court concluded that the supersedeas bond could appropriately be disbursed toward the satisfaction of a valid underlying judgment from another federal district.

Thus, the contempt judgment sought to be enforced in this Court is the valid judgment of a district court judge, and there is no reason why the supersedeas bond posted by Mr. Walker cannot be applied in satisfaction of the judgment rendered in favor of the Manville Trust by the Eastern and Southern Districts of New York. Id. It ordered disbursement of $ 97,760.90 to the Manville Trust, in care of its attorney of record, and the balance of the bond to be remitted to Mr. Walker, in care of his attorney of record.

II. DISCUSSION.

We now turn to the issues raised in this appeal.[2]

Mr. Walker appeals the Illinois District Court's denial of his Rule 60(b)(4) motion and its granting of the Manville Trust motion for execution on his supersedeas bond. In his view, the judgment of the Rendering Courts is void because it was entered by a magistrate judge, not a district judge. Mr. Walker asserts that, because the underlying judgment was void, the district court had no discretion when reviewing the Rule 60(b)(4) motion.

In evaluating this contention, we note at the outset that the district court's view of this case apparently changed rather drastically after its earlier rulings. In the orders that were the basis of the earlier appeal to us, the district court had taken the view that the validity of the underlying judgment was a matter best addressed by the Rendering Courts. Indeed, in its opinion of August 26, 1992, the court had posed the rhetorical question: Are collateral attacks interposed against a foreign contempt judgment and resulting sanctions, registered for enforcement in this district pursuant to 28 U.S.C. § 1962, properly considered by this Court? *In*

[2]Mr. Walker also claims, as a threshold matter, that the Trust does not have the capacity to sue. This argument has been waived. See Fed. R. Civ. P. 9(a); *Wagner Furniture Interiors, Inc., v. Kemner's Georgetown Manor, Inc.*, 929 F.2d 343, 345-46 (7th Cir. 1991).

re Joint Eastern & Southern Dists. Asbestos Litig., 800 F. Supp. 643, 644 (C.D. Ill. 1992). The court answered its own question emphatically: "In this case, absolutely not!" Id. In elaborating further, the district court determined that considerations of judicial comity and efficient judicial administration "dictate" that Mr. Walker's opposition to the enforcement of the judgment be referred to the Rendering Courts for review. *Id.* at 646. The court stressed that the judgment contained no "glaring irregularities," *Id.* at 647, and that the Rendering Courts have extensive familiarity with the complexities of the case. Id. In our own subsequent opinion, although noting that we had no jurisdiction to review the particular orders presented to us, we remarked that "consideration of convenience, comity and efficient judicial administration were the controlling factors." *In Re Joint Eastern & Southern Dists. Asbestos Litig.*, 22 F.3d 755, 762-63 (7th Cir. 1994).

The decision of the district court now under review provides us with no indication as to why the court, once so firm in its view that the Rendering Courts ought to review Mr. Walker's contention, now believes that it was preferable that it address squarely the merits of that submission. Although the matter is one quite clearly committed to the discretion of the district court, we cannot perceive from the record before us any reason for the district court's change of heart. Indeed, the concerns that originally persuaded the district court to defer to the Rendering Courts continue to make us reluctant to address the merits. Our examination of the record reveals some ambiguity as to the exact mandate given the magistrate judge by the Rendering Courts. Certainly, there appears to be a disparity between the scope of the verbal direction given by the district judge in the Rendering Courts and the scope of the written order entered over the signature of the clerk. Because this ambiguity might be very relevant in determining the degree of control that the district judge in the Rendering Courts desired to retain over the proceeding to determine the penalty for the contempt, we shall not base our disposition of this

appeal on a determination whether the magistrate judge exceeded his authority.

In our view, an antecedent question, with respect to which we can perceive no ambiguity, affords an ample and principled basis upon which the judgment of the district court ought to be affirmed. As the Manville Trust notes, there can be no doubt that, although he had notice of the proceedings, Mr. Walker never challenged before the Rendering Courts the reference to the magistrate judge. Nor did he ever challenge in that court, or in the reviewing appellate court, the decision of the magistrate judge. Indeed, there was no challenge by Mr. Walker until the collection proceedings were filed in the Central District of Illinois. Even then, Mr. Walker never attempted to initiate review proceedings in the Rendering Courts, despite the district court's expressed preference, initially, for that route.

Under these circumstances, we believe that it is clear that Mr. Walker has waived any objection he might have to the validity of the judgment of the Rendering Courts. Nor do we believe that it can be maintained that the issue ought to be confronted, despite Mr. Walker's obvious waiver, because the issue is "jurisdictional." In our view, such a label is inappropriate. Whatever the authority of the magistrate judge to enter the order in question in the absence of the consent of the parties, Mr. Walker's failure to object gave that consent. See *Peretz v. United States*, 501 U.S. 923, 932-33, 115 L. Ed. 2d 808, 111 S. Ct. 2661 (1991). Nor do we believe that the absence of an Article III judicial officer in these circumstances can be characterized as the sort of "structural protection," *Id.* at 937, that cannot be waived by the litigant. As Judge Easterbrook wrote for the court in an analogous situation, "which judicial officer presides . . . does not affect the court's subject-matter jurisdiction, for it has nothing to do with whether the tribunal may enter a judgment conclusively resolving the dispute. . . . We do not have a 'jurisdictional' problem of the kind that a tribunal must notice even though no party raised the prob-

lem. We have at most a mistaken interpretation of a law designating which judicial officer shall preside over the proceedings." *United States v. Wey*, 895 F.2d 429, 431 (7th Cir.), cert. denied, 497 U.S. 1029, 111 L. Ed. 2d 792, 110 S. Ct. 3283 (1990).

Because Mr. Walker made no effort, at any time in the proceedings, to contest the order of the magistrate judge before the Rendering Courts, the district court correctly denied relief under Rule 60(b)(4) and enforced the judgment presented to it under 28 U.S.C. § 1963. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

MANVILLE PERSONAL INJURY SETTLEMENT TRUST, *Plaintiff,* v. JAMES WALKER, *Defendant.*	No. S-91-66

JURISDICTIONAL STATEMENT

Manville Personal Injury Settlement Trust invoked the jurisdiction of the District Court by filing a Certification of Judgment for Registration from the United States District Court for the Eastern District of New York which had attached to it alleged judgments in favor of the Manville Personal Injury Settlement Trust against James Walker. James Walker has invoked the jurisdiction of the Seventh Circuit Court of Appeals by filing a Notice of Appeal on July 12, 1994, with the Clerk of the U.S. District Court, appealing from the order entered on June 17, 1994, granting the request of Manville Trust to be paid a portion of the bond monies posted by James Walker, from the order entered April 12, 1993, denying Defendant's Motion for Set-Off, from the order of September 18, 1992, denying Defendant's Motion for Reconsideration and from the opinion and order dated August 26, 1992, denying Defendant's Motion for Order Quashing Citation to Discover Assets, Dismissal of Supplementary Proceeding, and Request for Determination that Alleged Registered Judgment is Void.

Appellant attempted to obtain review of some of the orders listed above in appeals 92-3568 and 93-3217. Reciting that in a postjudgment collection proceeding " '[t]he judgment that conclude(s) the collection proceeding is the judgment from which the defendant can appeal' " (opinion filed May 2, 1994, at 10), the Seventh Circuit held that Defendant's appeals were premature.

The district court concluded its June 16, 1994, opinion with the language "Case closed." This is Defendant's appeal from the judgment concluding the collection proceeding.

JAMES WALKER, Defendant-Appellant

By: /s/ JAMES WALKER

JAMES WALKER, LTD.
Attorneys for Defendant-Appellant
P.O. Box 3455
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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

MANVILLE PERSONAL INJURY SETTLEMENT TRUST, *Plaintiff,* v. JAMES WALKER, *Defendant.*	No. S-91-66

NOTICE OF APPEAL

Defendant, JAMES WALKER, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order entered on June 17, 1994, granting the request of Manville Trust to be paid a portion of the bond monies posted by James Walker, from the order entered April 12, 1993, denying Defendant's Motion for Set-Off, from the order of September 18, 1992, denying Defendant's Motion for Reconsideration and from the opinion and order dated August 26, 1992, denying Defendant's Motion for Order Quashing Citation to Discover Assets, Dismissal of Supplementary Proceeding, and Request for Determination that Alleged Registered Judgment is Void.

Defendant requests that the judgment sought to be enforced be declared void and of no effect or in the alternative that the order denying Defendant's Motion for Set-Off be reversed and Defendant be granted a set-off against the judgment sought to be enforced.

JAMES WALKER, Defendant,

By: /s/ JAMES WALKER

JAMES WALKER, LTD.
Attorneys for Defendant
P.O. Box 3455
Bloomington, IL 61702-3455
309/828-5044

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS — SPRINGFIELD DIVISION

In re JOINT EASTERN AND SOUTHERN DISTRICTS ASBESTOS LITIGATION	No. S-91-66

ORDER

RICHARD MILLS, District Judge:

Pursuant to the opinion of this Court dated June 16, 1994, the Clerk of the Court is hereby directed to issue a United States Treasury check in the amount of $97,760.90, payable to Gregory R. Naron, attorney for the Manville Trust, to be mailed to the firm of Sonnenschein, Nath & Rosenthal, 8000 Sears Tower, 233 S. Wacker Drive, Chicago, IL 60606-6404. The remaining balance of the supersedeas bond of $2,239.10 shall be paid to David J. Walker, attorney for James Walker, by means of a separate United States Treasury check, and the check shall be mailed to David Walker at 111 West Washington Street, Chicago, IL 60602-2705.

SO ORDERED.

ENTERED: 17, June, 1994.

FOR THE COURT:

/s/ RICHARD MILLS

Richard Mills
United States District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS—SPRINGFIELD DIVISION

In re JOINT EASTERN AND SOUTHERN DISTRICTS ASBESTOS LITIGATION	No. S-91-66

OPINION

RICHARD MILLS, District Judge:

A case of contempt on contempt.

The Manville Trust moves for execution of its New York judgment against a supersedeas bond posted with this Court by Attorney James Walker.

On September 14, 1993, this Court held Attorney James Walker in civil contempt for his failure to answer questions propounded by an attorney for the Manville Trust at a citation to discover assets hearing held before U.S. Magistrate Judge Charles H. Evans on August 3, 1993. *In re Joint Eastern and Southern Districts Asbestos Litigation,* 830 F. Supp. 1153, 1156 (C.D. Ill. 1993). The citation hearing was undertaken for purposes of collecting a civil sanction of $81,655 plus interest which had been awarded in favor of the Manville Trust by the United States District Courts for the Southern and Eastern Districts of New York (the Rendering Courts). The sanction was the result of Mr. Walker's efforts to interfere with the disposition of funds set aside by the Johns-Manville Corporation to pay asbestos claimants, some of whom were represented by Mr. Walker.

On October 21, 1991, the Manville Trust registered the New York judgment in this Court pursuant to 28 U.S.C. §1963 and began collection proceeding against Mr. Walker.

When Mr. Walker—after many attempts to stall the proceedings in this Court—eventually refused to cooperate at the citation

to discover assets hearing, Magistrate Judge Evans referred the matter to United States District Judge Richard Mills for Mr. Walker to show cause for his obstruction of the citation proceedings. On Tuesday, September 14, 1993, Mr. Walker appeared before Judge Mills and reiterated his refusal to comply with the citation proceedings. Consequently, this Court sentenced Mr. Walker to imprisonment conditioned on cooperation with the Manville Trust in the discovery of Mr. Walker's assets. Being remedial in nature, this was a civil sanction. *See Securities and Exchange Commission v. Simpson,* 885 F.2d 390, 395 (7th Cir. 1989). Mr. Walker immediately appealed the decision of this Court, and the Court stayed Mr. Walker's imprisonment upon the posting of a $100,000 supersedeas bond.

On May 2, 1994, the Court of Appeals dismissed Mr. Walker's appeal of this Court's contempt finding and an earlier appeal filed by Mr. Walker challenging this Court's denial of a motion to dismiss the collection proceedings in the Central District of Illinois. *In re Joint Eastern & Southern Districts Asbestos Litigation,* ____ F.3d ____, 1994 WL 160391 (7th Cir. 1994). The Manville Trust now requests that this Court apply the $100,000 supersedeas bond toward satisfaction of the New York judgment, which, as of June 16, 1994, amounts to $97,760.90.

Mr. Walker objects to the motion of the Manville Trust on the ground that the New York judgment is void and unenforceable in this Court because it was imposed by a federal magistrate judge instead of a district court judge. However, Mr. Walker is incorrect in his factual and legal assertions. 28 U.S.C. §636(e) applies to situations in which a person commits an act of contempt before a magistrate judge. That is not what happened in this case. Here, Mr. Walker had violated two injunctive decrees of the Rendering Courts prohibiting further litigation against the assets of the Manville Trust, and the Rendering Courts directed Mr. Walker to appear at a show cause hearing to explain his disobeyance of those courts' orders.

On April 24, 1991, Mr. Walker failed to appear at the scheduled hearing, and as a result, United States District Judge Jack B. Weinstein adjudged Mr. Walker to be in civil contempt. Judge Weinstein then referred the matter to U.S. Magistrate Judge John L. Caden for a determination of the amount of sanctions to be assessed against Mr. Walker for his civil contempt. Magistrate Judge Caden subsequently determined that the Manville Trust was entitled to recover $81,655 plus interest from Mr. Walker for his contempt. (See footnote 1 of the May 2, 1994 opinion of the Seventh Circuit for a more detailed summary of the proceedings before the New York district courts).

Thus, the contempt judgment sought to be enforced in this Court is the valid judgment of a district court judge, and there is no reason why the supersedeas bond posted by Mr. Walker cannot be applied in satisfaction of the judgment rendered in favor of the Manville Trust by the Eastern and Southern Districts of New York.

Ergo, the Clerk of the Court is hereby directed to disburse $97,760.90 of the $100,000 bond deposited with this Court by Mr. Walker on September 16, 1993, to the Manville Trust, in care of the attorney of record for the Manville Trust, with the balance of the bond to be remitted to Mr. Walker.

SO ORDERED.

CASE CLOSED.

ENTERED: 16, June, 1994.

FOR THE COURT:

/s/ RICHARD MILLS

Richard Mills
United States District Judge

IN RE JOINT EASTERN & SOUTHERN DISTRICTS ASBESTOS LITIGATION; IN THE MATTER OF: JOHNS-MANVILLE CORPORATION, et al., Debtors; BERNADINE K. FINDLEY, as Executrix of the Estate of HILLIARD FINDLEY, et al., Plaintiffs, v. DONALD M. BLINKEN, et al., Defendants. APPEAL OF: JAMES WALKER

Nos. 92-3568, 93-3217

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

22 F.3d 755; 1994 U.S. App. LEXIS 9548; 28 Fed. R. Serv. 3d (Callaghan) 1259

November 4, 1993, Argued

May 2, 1994, Decided

PRIOR HISTORY: On Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 91 M 66. Richard Mills, Judge.

DISPOSITION: DISMISSED.

COUNSEL: For JAMES WALKER, Appellant (No. 92-3568): James R. Wylder, Bloomington, IL. William J. Harte, HARTE & ASSOCIATES, Chicago, IL.

For MANVILLE PERSONAL INJURY SETTLEMENT TRUST, Appellee (No. 92-3568): Jeffrey P. Lennard, Steven H. Frankel, Christopher Q. King, Gregory R. Naron, SONNENSCHEIN, NATH & ROSENTHAL, Chicago, IL.

For MANVILLE PERSONAL INJURY SETTLEMENT TRUST, Plaintiff—Appellee (No. 93-3217): Jeffrey P. Lennard, Steven H. Frankel, Christopher Q. King, Gregory R. Naron, SONNENSCHEIN, NATH & ROSENTHAL, Chicago, IL.

For JAMES WALKER, Defendant—Appellant (No. 93-3217): James R. Wylder, James Walker, Bloomington, IL. William J. Harte, HARTE & ASSOCIATES, Chicago, IL.

JUDGES: Before BAUER and RIPPLE, Circuit Judges, and REYNOLDS, District Judge. *

* Hon. John W. Reynolds, United States District Judge for the Eastern District of Wisconsin, is sitting by designation.

OPINION BY: RIPPLE

OPINION: RIPPLE, Circuit Judge.

Attorney James Walker was held in contempt in consolidated bankruptcy proceedings in the United States District Courts for the Southern and Eastern Districts of New York. He was ordered to pay a monetary fine. That judgment of contempt was registered in the Central District of Illinois and proceedings were commenced to collect on that judgment. Mr. Walker resisted, principally through a motion for relief under Rule 60(b)(4) of the Federal Rules of Civil Procedure and through a motion to quash the citation to discover assets. Unsuccessful in these efforts, he subsequently filed a notice of appeal. This matter is before us in appeal No. 92-3568.

Pursuant to the order of the district court, an examination to discover assets was later conducted before a United States Magistrate Judge. Mr. Walker refused to answer certain questions at this proceeding; the district court accordingly held him in civil contempt and imposed upon him a conditional sentence of imprisonment. Mr. Walker appeals this contempt ruling in appeal No. 93-3217. For the reasons that follow, we dismiss both appeals for want of jurisdiction.

I. BACKGROUND

The matter before us is the consolidation of two appeals which are tangential to the asbestos litigation conducted jointly by the United States District Courts for the Southern and Eastern Districts of New York (the "Rendering Courts").[3] Mr. Walker represented certain plaintiffs in that matter. During the course of

[3]A brief summary of the background to this litigation may be helpful. For a fuller account, see the district court opinions in the case now before us, 800 F. Supp. 643 (C.D. Ill. 1992) and 830 F. Supp. 1153 (C.D. Ill. 1993), and the underlying bankruptcy litigation, *In re Joint Eastern & Southern Dists. Asbestos Litig.*, 129 Bankr. 710 (E. & S.D.N.Y. 1991), vacated, 982 F.2d 721 (2d Cir. 1992), modified on reh'g, 993 F.2d 7 (2d Cir. 1993). After Johns Manville Corporation filed for bankruptcy protection in 1982, the Manville Trust was created as part of the Corporation's reorganization plan, to satisfy Manville's asbestos-related liabilities. Approved in 1988, the Plan established procedures for the filing of claims by asbestos claimants. Attorney James Walker represented some of those claimants. When the Trust experienced substantial cash shortages because of the escalating costs of litigation, the reference of the Manville bankruptcy was partially withdrawn; Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York was named to supervise the Plan and to protect the Trust assets. A Special Master confirmed that very limited assets were available. As a result, on November 23, 1990, the Rendering Courts enjoined all pending litigation against the Trust to halt further dissipation of Trust assets. Nevertheless, Mr. Walker caused citations to discover assets to be issued on December 31, 1990 to Bankers Trust Company, custodian of the Trust's assets. Bankers Trust moved to quash the citations.

On February 13, 1991, the Rendering Courts entered another order, certifying a mandatory, non-opt-out class of claimants and staying the execution or enforcement of judgments against the Trust's assets. However, Mr. Walker pursued and was granted ex parte judgments against Bankers Trust on February 25, 1991 in the Circuit Court of McLean County, Illinois. On April 1, 1991, after discovering the entry of those judgments, Bankers Trust moved to vacate them. In addition, on April 19, 1991, the Rendering Courts entered a show cause order against Mr. Walker. When Mr. Walker failed to appear at the hearing, the Rendering Courts held Mr. Walker in civil contempt for knowingly violating the November 23, 1990 and February 13, 1991 Orders, and directed him to dismiss the citation proceedings and to move to vacate the judgments against Bankers Trust. On May 7, 1991, the McLean County Circuit Court granted Bankers Trust's motion to vacate the judgment against it.

that litigation, the Rendering Courts held Mr. Walker in contempt for knowingly violating two injunctions. The issue of imposing sanctions was referred to a Magistrate Judge and, on September 3, 1991, the Rendering Courts entered judgment, ordering that Mr. Walker be sanctioned in the amount of $ 81,655.01 plus interest. Mr. Walker did not appeal that order to the United States Court of Appeals for the Second Circuit.

On October 21, 1991, Manville Trust ("the Trust"), whose assets are supervised by the Rendering Courts in the asbestos litigation, brought proceedings to collect the contempt sanctions imposed on Mr. Walker. The Trust registered the New York judgment in the United States District Court for the Central District of Illinois pursuant to 28 U.S.C. § 1963.[4] Pursuant to Rule 69(a)[5] of the Federal Rules of Civil Procedure, it also filed a

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The Rendering Courts referred to Magistrate Judge John L. Caden the determination whether sanctions should be imposed and, if so, in what amount. Again Mr. Walker failed to appear at the sanctions hearing. The court assessed against Mr. Walker a daily fine of $1000 in addition to the costs, expenses and attorney's fees incurred by the Manville Trust and Bankers Trust. By Orders of May 13 and June 10, 1991, the Magistrate Judge assessed the sanctions; on September 3, 1991, the district court entered judgment ordering that Manville Trust recover $81,655.01 plus interest from Mr. Walker. He neither objected to any sanction order nor paid any of the amounts assessed. Manville Trust then commenced these proceedings in the District Court for the Central District of Illinois to collect the sanctions.

[4]This section reads in pertinent part:

A judgment in an action for the recovery of money or property entered in any district court or in the Court of International Trade may be registered by filing a certified copy of such judgment in any other district . . . when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. . . . A judgment so registered shall have the same effect as a judgment of the district court where registered and may be enforced in like manner.

[5]Fed. R. Civ. P. 69(a) states:

Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment,

motion in that court for an order of citation to discover Mr. Walker's assets. On the same date, the citation was issued. On November 18, 1991, Mr. Walker filed motions to quash the citation and to dismiss the supplementary proceedings, and a request pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure for determination that the registered foreign judgment is void.[6]

On August 26, 1992, the district court denied, without prejudice to refile in the Rendering Courts, Mr. Walker's several challenges to the validity of the Rendering Courts' underlying contempt sanctions judgment.[7] See *In re Joint Eastern & Southern Dists. Asbestos Litig.*, 800 F. Supp. 643 (C.D. Ill. 1992). It noted that the Rendering Courts had previously addressed the issues raised by Mr. Walker, and found that "both judicial comity and the pursuit of efficient judicial administration dictate that Walk-

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and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

[6]Fed. R. Civ. P. 60(b)(4) reads in pertinent part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void.

[7]The court addressed five arguments presented by Mr. Walker:

(1) The Rendering Courts' Orders of November 23, 1990 and February 13, 1991 are void for lack of subject matter jurisdiction.

(2) Those orders are void for lack of personal jurisdiction.

(3) Those orders violate the Anti-Injunction Act.

(4) The September 3, 1991 Judgment is invalid because Mr. Walker failed to consent to those proceedings before the magistrate judge pursuant to 28 U.S.C. § 636(c).

(5) The Citation to Discover Assets is invalid due to its failure to conform to the requirements of Illinois Supreme Court Rule 277(e).

See 800 F. Supp. at 645.

er's opposition to the enforcement of judgment based on subject matter jurisdiction, personal jurisdiction, the restrictions of the Anti-Injunction Act and the actions of Magistrate Judge Caden be referred to the rendering Courts for review." *Id.* at 646. Because these efforts were denied without prejudice, Mr. Walker had the option of refiling in the Rendering Courts.

The district court then denied with prejudice Mr. Walker's motion to quash the citation. Mr. Walker contended that the citation failed to state expressly that the citation hearing would be conducted by the rules governing depositions, as required by Illinois Supreme Court Rule 277(e).[8] The district court disagreed: It stated, "It is clear from the face of the citation that the hearing would occur in accordance with the rules governing depositions." *Id.* at 647. The district court then set the date for Mr. Walker's citation hearing.

After numerous delays, Mr. Walker appeared with counsel for citation examination before a magistrate judge in the Central District of Illinois on August 3, 1993. He refused, however, to answer any questions, and he therefore was held in contempt[9]. On September 14, 1993, following a hearing, the district court determined that Mr. Walker's refusal to answer questions warranted

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[8]Illinois Supreme Court Rule 277(e) states:

The examination of the judgment debtor, third party, or other witnesses shall be before the court, or, if the court so orders, before an officer authorized to administer oaths designated by the court, unless the judgment creditor elects, by so indicating in the citation or subpoena served or by requesting the court to so order, to conduct all or a part of the hearing by deposition as provided by the rules of this court for discovery depositions.

[9]Mr. Walker explained to the court that his refusal to answer the questions was based on his desire to create grounds for contempt which, in his view, would permit him to seek review in this court of the underlying judgment. For Mr. Walker, the "underlying judgment" has been at times the judgment of contempt sanctions entered against him by the Rendering Courts and registered in the Central District of Illinois and at other times the Rendering Courts' judgments enjoining all pending and future litigation against the Manville Trust.

the imposition of sanctions. *In re Joint Eastern & Southern Dists. Asbestos Litig.*, 830 F. Supp. 1153, 1155 (C.D. Ill. 1993). After considering Mr. Walker's past conduct,[10] the court concluded that "the appropriate sanction would be imprisonment conditioned on cooperation with the Manville Trust in the discovery process." *Id.* Consequently the court issued an order holding Mr. Walker in civil contempt for failure to comply with the citation and remanding him into custody until he should decide to cooperate with the Manville Trust concerning the citation to discover his assets. *Id.* at 1156. The court further indicated its willingness to stay the confinement order upon the posting of a supersedeas bond within 48 hours. Mr. Walker did file the supersedeas bond.[11] He has not, as far as the record before us reveals, refiled his claims

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[10]Mr. Walker has been found in contempt of both the federal and Illinois courts on other occasions. See e.g., *Castillo v. St. Paul Fire & Marine Ins. Co.*, 938 F.2d 776 (7th Cir. 1991) (contempt for unprofessional conduct in connection with discovery; sanction affirmed); *Castillo*, 828 F. Supp. 594 (C.D. Ill. 1992) (one-year suspension from practice of law issued November 1992); see also *Kilpatrick v. First Church of the Nazarene*, 182 Ill. App. 3d 461, 538 N.E.2d 136, 130 Ill. Dec. 925 (Ill. App. 1989) (Walker's trial tactics not condoned, but sanction vacated); *Mau v. North Am. Asbestos Corp.*, 156 Ill. App. 3d 926, 509 N.E.2d 1112, 109 Ill. Dec. 273 (Ill. App. 1987) (vacating contempt order because trial court's imposition of conditions concerning order of witnesses at trial was abuse of discretion); *Rowley v. Rousseau*, 81 Ill. App. 3d 193, 400 N.E.2d 1045, 1048, 36 Ill. Dec. 465 (Ill. App. 1980) (affirming contempt ruling of trial court).

[11]On September 16, 1993, the district court approved Mr. Walker's supersedeas bond for $100,000. The document filed with the posting of the bond acknowledged the appeal to this court on September 14, 1993, and stated the underlying conditions:

> Therefore, the condition of this $100,000 bond shall be for the prosecution of the appeal and the appearance of James Walker to submit to the Marshal to be taken into custody or to answer questions in compliance with the Citation to Discover Assets and the Court's order of September 14, 1993, in the event the order is affirmed or the appeal dismissed. If the judgments which are the subject of this action are satisfied or if the order of September 14, 1993, is reversed, then this obligation shall be void, and the $100,000 bond shall be returned to James Walker.

concerning the underlying judgment in the Rendering Courts. He now appeals to this court both orders of the United States District Court for the Central District of Illinois.

II. ANALYSIS

From the beginning of this case, we have questioned our jurisdiction to review this appeal.[12] Courts of appeals have jurisdiction over appeals from all final decisions of district courts. 28 U.S.C. § 1291. The judgment of a district court is final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 89 L. Ed. 911, 65 S. Ct. 631 (1945). We now shall turn to an examination of whether we have the authority to hear either of these appeals.

A. Appeal No. 92-3568

1. The first appeal, No. 92-3568, brings to this court the decisions of the district court of August 26, 1992. In essence, these decisions denied without prejudice Mr. Walker's motion for dismissal of the judgment of contempt entered against him by the Rendering Courts. As we have noted earlier, this denial was without prejudice to its being renewed before the Rendering Courts. The district court also determined that the citation to discover assets was without procedural infirmity and need not be quashed.

At the outset, we set forth the fundamental principles that our earlier cases establish for determining whether an order entered in a postjudgment proceeding may be appealed to this court. Perhaps the most fundamental of these principles, rooted firmly in our cases, is that a postjudgment proceeding, for purposes of

[12]On October 27, 1992, after the filing of the first appeal, we ordered the parties to submit memoranda stating why the appeal should not be dismissed for lack of jurisdiction. Without resolving the question, we allowed the parties to proceed to briefing, and later consolidated the two appeals for argument and disposition. Orders of February 11 and October 19, 1993.

appeal, must be viewed as a separate lawsuit from the action which produced the underlying judgment. Consequently, the requirements of finality must be met without reference to that underlying judgment. *Resolution Trust Corp. v. Ruggiero*, 994 F.2d 1221, 1224 (7th Cir. 1993); *SEC v. Suter*, 832 F.2d 988, 990 (7th Cir. 1987); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1184-85 (7th Cir. 1987). A postjudgment order is final, then, if it disposes completely of the issues raised. Accordingly, we have joined every other circuit[13] to have considered the question in holding that, as a general rule, an order authorizing discovery in aid of execution of judgment is not appealable until the end of the case. *Central States Southeast & Southwest Areas Pension Fund v. Express Freight Lines, Inc.*, 971 F.2d 5, 6 (7th Cir. 1992). The denial of a motion to quash the citation proceeding simply lets the proceeding continue and therefore is not final or appealable. See *Id.* (explaining that the denial of a postjudgment discovery order is appealable but that the granting of the discovery is not). Applying the general rule that, when determining the appealability of a postjudgment collection proceeding, the measure of finality is assessed not at the entry of the underlying judgment but at the end of the separate proceeding to execute or enforce that judgment for the payment of money, we stated: A postjudgment order might seem final by definition because the judgment is already behind it. But there are judgments and there are judgments. . . . A contested collection proceeding will end in a judgment or series of judgments granting supplementary relief to the plaintiff. The judgment that concluded the collection proceeding is the judgment from which the defendant can appeal. *Central States*, 971 F.2d at 6 (emphasis added) (citations omitted).

Since deciding *Central States*, this court has revisited the issue and suggested that there might be circumstances in which a dis-

[13]*Richmark Corp. v. Timber Falling Consultants, Inc.*, 937 F.2d 1444, 1449 (9th Cir. 1991), cert. denied, 121 L. Ed. 2d 219, 113 S. Ct. 295 (1992); *Rouse Constr. Int'l, Inc. v. Rouse Constr. Corp.*, 680 F2d 743, 746 (11th Cir. 1982).

covery order, like one emanating from a citation hearing, might be final and appealable: Often the sole object of such a proceeding is discovery of the judgment debtor's assets, since once they are discovered the judgment creditor may levy on them without obtaining a further court order. Ill.Rev. Stat. ch. 110, P 2-1501. And an order that is the terminus of the case in the district court is final for purposes of appeal even if it is not a conventional judgment—even if it commences a proceeding in another forum. *Resolution Trust*, 994 F.2d at 1225. The facts of *Resolution Trust* afforded the court no opportunity to delineate the contours to this possible exception to the general rule. This case also affords no occasion for its concrete application. The circumstances surrounding the ruling of the district court make it clear that the court did not regard its ruling as a final disposition of the matter before it. Indeed, in its subsequent order, the district court recognized explicitly the lack of finality of this earlier ruling when it referred to this appeal as "unripe." *In Re Eastern & Southern Dists. Asbestos Litig.*, 830 F. Supp. 1153, 1154 (C.D. Ill. 1993); cf. *Rosser v. Chrysler Corp.*, 864 F.2d 1299, 1304 (7th Cir. 1988) (holding that there is no appellate jurisdiction "where the district court contemplates further proceedings"). Indeed, Mr. Walker's subsequent actions make it clear that he did not consider the district court's denial of the motion to quash to be the last word. He subsequently filed a motion to set off, in which he requested that the sanctions be paid out of client funds in another case which had allegedly been assigned to him. We also must note the possibility that there would be additional proceedings with respect to the motion for relief under Rule 60(b)(4), if Mr. Walker decided to pursue the matter in the Rendering Courts. This contingency added another factor of uncertainty that made the decision of the district court on August 26, 1992 anything but a final disposition of the Manville Trust's effort to enforce the judgment it had registered in the district court.

2. We must also explore the possibility that the part of the district court's decision that denied the motion for relief under

Rule 60(b)(4) is severable from the remainder of its decision and appealable in its own right. The district court denied the motion without prejudice to its renewal in the Rendering Courts. It ruled that the issue of the validity of the Rendering Court's judgment was most appropriately addressed, as a matter of comity and sound judicial administration, by the court that had rendered the judgment. The district court pointed out that these considerations were especially important in the case of a contempt judgment:

> In the instant case, Walker seeks to oppose, in a foreign jurisdiction, the consequences of behavior which the rendering Courts found sufficient to warrant a finding of contempt and the imposition of sanctions. This court finds that in the absence of glaring irregularities, comity demands that it respect such a decision. 800 F. Supp. at 646-47. The district court further noted that the Rendering Courts had addressed thoroughly both of the contentions raised by Mr. Walker in his Rule 60(b)(4) motion.

Whether Mr. Walker can appeal the decision of the district court to defer to the Rendering Courts with respect to the Rule 60(b)(4) motion is an issue that this circuit has confronted only once, in *Fuhrman v. Livaditis*, 611 F.2d 203 (7th Cir. 1979). On that occasion, the court simply followed, without discussion, the earlier holding of the United States Court of Appeals for the Second Circuit in *United States ex rel. Mosher Steel Co. v. Fluor Corp.*, 436 F.2d 383 (2d Cir. 1970), cert. denied, 402 U.S. 945 (1971). In *Fluor*, the Second Circuit determined that such a decision was appealable because it was analogous to the decision of a district court to dismiss an action on the grounds of forum non conveniens. In reaching this decision, the Second Circuit acknowledged that the common law doctrine of forum non conveniens has been substantially replaced by transfer jurisdiction under 28 U.S.C. § 1404(a).[14] *Fluor*, 436 F.2d at 385 n.1. The

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[14]This section reads:

> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

court also acknowledged that the practical effect of denial of the motion at issue was similar to the denial of the nonappealable decision to deny transfer under § 1404(a). Id. at 384. Nevertheless, without further explanation, the court determined that "the more compelling analogy" was to the appealable decision to grant a dismissal on the ground of forum non conveniens.[15] *Id.*

We find ourselves in respectful disagreement with this decision. As we see it, the most appropriate analogy is to the transfer statute, rather than to the common law doctrine of forum non conveniens.[16] Several considerations lead us to this conclusion. First, we believe that the decision to defer to the court of rendition with respect to the disposition of a Rule 60(b)(4) motion is guided by essentially the same criteria that guide a decision to grant a transfer under § 1404(a). Under that statute, a district court may transfer a case to another federal district or division "where it might have been brought" if the court determines that such a transfer is "for the convenience of parties and witnesses" and "in the interest of justice." While modeled to some degree on the doctrine of forum non conveniens, this statutory transfer jurisdiction was clearly intended to vest in the transferor court more discretion than it had been permitted to exercise under the common law doctrine because "the harshest result of the application of the old doctrine . . . , dismissal of the action, was eliminated by the provision." *Norwood v. Kirkpatrick*, 349 U.S. 29, 32, 99 L. Ed. 789, 75 S. Ct. 544 (1955); see also *Piper Aircraft*

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[15]The grant of a motion to dismiss on the common law grounds of forum non conveniens is appealable. *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 849 n.4 (5th Cir. 1990); see also *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 43 (3d Cir. 1988) (assuming dismissal to be appealable and reviewing district court decision on merits).

[16]It is well settled that the decision of the district court to grant a transfer motion is not subject to appeal as final judgement. See, e.g., *Nascone v Spudnuts, Inc.*, 735 F.2d 763, 772-73 (3d Cir. 1984); *D'Ippolito v. American Oil Co.*, 401 F.2d 764, 764-65 (2d Cir. 1968) (per curiam); 15A Charles A. Wright et al., Federal Practice and Procedure § 3914.12, at 718 (1992).

Co. v. Reyno, 454 U.S. 235, 253, 70 L. Ed. 2d 419, 102 S. Ct. 252 (1981). As the Supreme Court put it in *Van Dusen v. Barrack*, "section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice." 376 U.S. 612, 616, 11 L. Ed. 2d 945, 84 S. Ct. 805 (1964) (footnote omitted).

Similar considerations must guide the determination of the district court in its decision not to entertain a Rule 60(b)(4) attack on a judgment originally rendered in another district but now registered on its own docket for purposes of enforcement.[17] In-

[17]We note that the authority of the registration court to entertain a motion under rule 60(b)(4) apears to be well established. As one of the leading treatises notes succinctly:

Judicial administration usually suffers when a court is said to lack power or jurisdiction. And we believe that would be true if the court of registration is held to lack power or jurisdiction to grant relief under 60(b). James W. Moore, et al., Moore's Federal Practice P 60.28[1], at 60-311 (2d ed. 1993). More important, it is clear from the long history of cases that the registration court's jurisdiction over 60(b) motions has not been placed in doubt. Indeed, the caselaw establishes that the registration court does not lack the power to decide on the vcalidity of the foreign judgment, but must exercise its ability to make that determination with sound discretion. It has long been held that a district court enforcing a foreign judgment has a broad discretionary ability to choose whether to hear a Rule 60(b)(4) motion filed agaianst the foreign judgment.

A judgment entered against parties not subject to the personal jurisdiction of the rendering court is a nullity. When, in an enforcement proceeding, the validity of the judgment is questioned on this ground, the enforcing court has the inherent power to void the judgment, whether the judgment was issued by a tribunal within the enforcing court's domian or by a court of a foreign jurisdiction, unless inquiry into the matter is barred by the principles of res judicata. *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 525, 51 S. Ct. 517, 518, 75 L. Ed. 1244 (1931). While the original court's jurisdiction is presumptively valid, if the issue of jurisdiction has not previously been litigated it may be raised in the enforcing court. *Adam v. Saenger*, 303 U.S. 59, 62, 58 S. Ct. 454, 456, 82 L. Ed. 649 (1938). *Covington Indus. v. Resintex A. G.*, 629 F.2d 730, 732 (2d Cir. 1980) (holding that Rule 60(b)(4) may be invoked in the registration court to obtain relief from foreign default judgment attacked as void or for lack of personal jurisdiction.)

deed, in *Fuhrman*, 611 F.2d at 204-05, we noted the policy considerations that ought to guide a registration court's decision to defer to the rendering court. We noted that considerations of convenience, comity and efficient judicial administration were the controlling factors.[18] Id. at 204-05. These factors closely approximate the factors that govern the decision to transfer a case from one district or division to another under 28 U.S.C. § 1404(a).

More fundamentally, the decision to defer to the rendering court when its judgment is attacked in the registration court is most realistically viewed as a decision of sound judicial administration rather than as a juridical act having the consequences of finality that require further review by an appellate tribunal. It is a necessary concomitant of the expedited system of judgment registration provided by 28 U.S.C. § 1963. The decision to defer to the rendering forum deprives no litigant of the opportunity to have the claim fairly adjudicated by a federal tribunal. It merely assures that judicial resources are correctly allocated and that the

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[18]In *Fuhrman*, we concluded that, although a rigid rule was not appropriate, permitting the rendering court to address the challenge because of its familiarity with the underlying issue was "logical." 611 F.2d at 205. Therefore, even though it is clear that the registration court has the authority to consider the motion, such a motion for relief from judgment is usually brought in the rendering court. See *Credit Alliance Corp. v. Campbell*, 845 F.2d 725, 727 (7th Cir. 1988); *Indian Head Nat'l Bank v. Brunelle*, 689 F.2d 245, 249 (1st Cir. 1982); *Covington*, 629 F.2d at 733, *Fluor*, 436 F.2d at 385. The First Circuit has suggested two classes of cases that can present exceptions to that general rule: those alleging that the judgment is void for lack of jurisdiction or because of fraud, accident or mistake, and those asserting grounds that would support an independent equitable action. *Indian Head*, 689 F.2d at 249 n.8 & 249-50. In those categories, according to *Indian Head*, the registration court may directly exercise its equitable jurisdiction. However, according to the First Circuit, if the 60(b) motion does not fall into those narrow categories, the registration court's determination of the matter would be an inappropriate extension of these exceptions to the general rule. Id. at 251. The Second Circuit also has recognized that it can be appropriate for the registration court to grant relief in the case of a default judgment which is void for want of personal jurisdiction. See *Covington*, 629 F.2d at 733-34.

litigant is not able to shop for a more favorable forum that may be more disposed to his claim because it is less familiar with it.

Finally, in determining whether this decision of the district court to defer to the rendering courts is within our appellate jurisdiction, we must take into account that, since the decision of the Second Circuit in Fluor, we have received a good deal of additional guidance on the matter of "finality" from the Supreme Court of the United States. On several occasions in recent years, the Court has emphasized that allowing interlocutory appeals comes at a significant price. Resolution of the principal litigation is delayed, often significantly. The authority of the district court to supervise litigation is undermined, and the trial court loses the firm hand that is necessary to assure that the litigation stays on track, even when one of the parties would prefer a more leisurely resolution or no resolution at all. See *Stringfellow v. Concerned Neighbors in Action,* 480 U.S. 370, 380, 94 L. Ed. 2d 389, 107 S. Ct. 1177 (1987); *Richardson-Merrell, Inc. v. Koller,* 472 U.S. 424, 430-31, 86 L. Ed. 2d 340, 105 S. Ct. 2757 (1985); *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 374, 66 L. Ed. 2d 571, 101 S. Ct. 669 (1981). Both of these considerations are of significant importance in the situation before us. The task of the district court in this case was to give effect to the congressional mandate that animates 28 U.S.C. § 1963, the statute that permits the judgment of one district to be registered and enforced in another. The purpose of this statute is "to simplify and facilitate collection on valid judgments." *Coleman v. Patterson,* 57 F.R.D. 146, 149 (S.D.N.Y. 1972). As the Senate Judiciary Committee noted while considering an amendment to the statute in 1954: Registration of judgments in other districts is a modern legal device. It assists judgment creditors by making it possible for them to pursue the property of a debtor in satisfaction of a judgment by the ordinary process of levying execution on a judgment in any district where the judgment is registered. The result is that both creditors and debtors are relieved of the additional cost and harassment of

further litigation which would otherwise be required by way of an action on the judgment in a district other than that where the judgment was originally obtained. S. Rep. No. 1917, 83rd Cong., 2d Sess. (1954), reprinted in 1954 U.S.C.C.A.N. 3142, 3142.[19]

In our view, therefore, it is difficult to see how this legislative purpose can be effectuated if the enforcement process is retarded by appellate proceedings to review the decision of the registration court to defer to the forum that knows the case best and where, in all likelihood, the merit of that collateral attack can be reviewed most expeditiously.[20]

3. Finally, we note that, although it is possible for a court of appeals to review a discovery order through a writ of mandamus, that device is reserved for extraordinary circumstances. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289, 99 L. Ed. 2d 296, 108 S. Ct. 1133 (1988). Among the criteria that the petitioner must meet are a showing that the relief requested cannot be achieved in any other way and that he has a clear and indisputable right to that relief. *Kerr v. United States Dist. Court*, 426 U.S. 394, 403, 48 L. Ed. 2d 725, 96 S. Ct. 2119 (1976); *Matter of Sandahl*, 980 F.2d 1118, 1119 (7th Cir. 1992); see also *Powers v. Chicago Transit Auth.*, 846 F.2d 1139, 1142-43 (7th Cir. 1988) (discussing application of criteria in discovery context). There can

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[19]28 U.S.C. § 1963 is intended "to provide a simple, inexpensive and expeditious means to enforce federal money judgments." Hershel Shanks & Steven A. Standiford, Schizophrenia in Federal Judgment Enforcement: Registration of Foreign Judgments under 28 U.S.C. § 1963, 59 Notre Dame L. Rev. 851, 857 (1984). The statute permits registration of a judgment that is "final by appeal or expiration of time for appeal."

[20]Because this part of our decision conflicts with the decision of the United States Court of Appeals for the Second Circuit in *United States ex rel. Mosher Steel Co. v. Fluor Corp.*, 436 F.2d 383 (2d Cir. 1970), cert. denied, 402 U.S. 945 (1971) and is inconsistent with the approach of this circuit in *Fuhrman v. Livaditis*, 611 F.2d 203 (7th Cir. 1979), it has been circulated to the entire court pursuant to Circuit Rule 40(f). No member of the court in active service has requested that the matter be reheard en banc.

be little question that these stringent criteria are not met in this case. Certainly, Mr. Walker has not established a clear and indisputable right to the relief that he seeks. The decision of the district court in Illinois to defer to the Rendering Courts was a common-sense decision that is consonant with the usual approach of district courts asked to review the judgment of another district now registered for purposes of collection. As the district court pointed out, its decision in this case was especially appropriate because the registered judgment had been entered by the Rendering Court as a result of a contempt proceeding and because it also appeared that the contentions of Mr. Walker had already been considered by that court. There is no basis that would justify the invocation of our mandamus power.

B. Appeal No. 93-3217

We now consider whether the district court's second order, the civil contempt ruling against Mr. Walker, is appealable. We suggested in *Central States* that a person ordered to produce material in a postjudgment discovery proceeding, "if desperate for an immediate appeal, can disobey the order and appeal the resulting judgment for criminal contempt." Id. (emphasis added).[21] In this instance, however, we are dealing with a judgment of civil contempt. We have held "that an order of civil contempt enforcing a discovery order in supplementary proceedings is . . . unap-

[21]In the criminal setting, the denial of a motion to quash a subpoena is not final. *United States v. Ryan,* 402 U.S. 530, 532, 29 L. Ed. 2d 85, 91 S. Ct. 1580 (1971). Instead, one "must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *Id.* (citing *Cobbledick v. United States,* 309 U.S. 323, 84 L. Ed. 783, 60 S. Ct. 540 (1940)). The contempt judgment for refusal to comply with the subpoena is appealable, and the appeal can include a challenge to the subpoena itself. For that reason, it is appropriate to describe contempt as "a last-ditch or safety-valve device for obtaining appellate review of unappealable orders." *Crowder v. Sullivan,* 897 F.2d 252, 253 (7th Cir. 1990) (per curiam).

pealable." *Resolution Trust Corp. v. Ruggiero*, 987 F.2d 420, 421 (7th Cir. 1993) (per curiam). This rule is based on the established principle that an order holding a party in civil contempt is not a final decision for purposes of § 1291. *Powers v. Chicago Transit Auth.*, 846 F.2d 1139, 1141 (7th Cir. 1988) (collecting cases). We commented in that opinion that thoughtful members of the legal profession have suggested that the different treatment accorded criminal and civil contempts is not appropriate. Id. However, as we noted in *In re Witness Before the Special October 1981 Grand Jury*, 722 F.2d 349, 351 (7th Cir. 1983), and confirmed in *Powers*, 846 F.2d at 1141, this rule is not a matter that we are free to change on our own.[22]

Finally, we note that the parties do not suggest that, because the judgment of contempt included a sentence of imprisonment, our jurisdiction might be premised on the Recalcitrant Witness Statute, 18 U.S.C. § 1826.[23] We believe this omission is well

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[22]We note that Congress has recently given the Supreme Court, acting through the rule-making process established by the Rules Enabling Act, 28 U.S.C. § 2072, the authority to fine tune matters of "finality" and to implement additional avenues of interlocutory appeal. The Judicial Improvement Act of 1990, Pub. L. No. 101-650, also authorizes the Supreme Court to make a rule or rules that define when a judgment is final. Specifically, the statute adds a new paragraph to 28 U.S.C. § 2072; it states;

(c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

The Federal Courts Administration Act of 1992, Pub. L. No. 102-571, authorizes the Supreme Court to expand by rule the instances in which an interlocutory decision is appealable. The statute adds a new paragraph to 28 U.S.C. § 1292. The new paragraph states: The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

[23]28 U.S.C. § 1826, in pertinent part, provides:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, . . . the court, upon such refusal, . . . may summarily order

taken. That statute does not provide an appropriate predicate for our jurisdiction. As a noted treatise has explained, the requirements of that statute are "quite separate from the final judgment rule." 15B Charles A. Wright et al., Federal Practice and Procedure § 3917, at 410 (1976). Indeed, the legislative history specifically notes that the statute was intended "to codify present practice," including, we must assume, the party witness exception to the right to appeal. The plain language of the statute, moreover, does not confer a right to appeal, but simply regulates how a preexisting right to appeal ought to be prosecuted.[24] Accordingly, we must conclude that the district court's judgment of civil contempt is not reviewable in this court because it is not a final judgment.

Conclusion

The two judgments consolidated for appeal before us are not final judgments within the meaning of § 1291. Nor does this case

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his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal. . . .

[24]We also note that the statute appears never to have been invoked to afford a party witness in a civil proceeding the right to appeal a judgment of civil contempt. In *United States v. Pilcher,* 672 F.2d 875 (11th Cir.), cert. denied, 459 U.S. 973, 74 L. Ed. 2d 286, 103 S. Ct. 306 (1982), the court assumed that it could review a judgment of civil contempt involving imprisonment when the contemnor was a defendant in an ongoing criminal trial. In *United States v. Johnson,* 801 F.2d 597, 599 (2d Cir. 1986), however, the court seems to have held that the usual party witness rule ought to apply in such a situation.

present a situation that would justify the use of the extraordinary remedy of mandamus. Accordingly, the appeals are dismissed for want of appellate jurisdiction.

DISMISSED.

IN RE JOINT EASTERN & SOUTHERN DISTRICTS ASBESTOS LITIGATION; IN RE JOHNS-MANVILLE CORPORATION, et al., Debtors.

BERNADINE K. FINDLEY, as Executrix of the Estate of HILLIARD FINDLEY, et al., Plaintiffs, v. DONALD M. BLINKEN, et al., Defendants.

S-91-66

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS, SPRINGFIELD DIVISION

800 F. Supp. 643; 1992 U.S. Dist. LEXIS 14264

August 26, 1992, Filed and Entered

COUNSEL: Elena Z. Kezelis, 421 Natchez Trace, Springfield, IL 62707. Steven H. Frankel, Christopher Q. King, Karen J. Dilibert, Sonnenschein, Nath & Rosenthal, 8000 Sears Tower, Chicago, IL 60606.

James Walker, 207 W. Jefferson, Bloomington, IL 61702-3455.

JUDGES: MILLS

OPINION BY: FOR THE COURT; RICHARD MILLS

OPINION: OPINION

RICHARD MILLS, District Judge:

Are collateral attacks interposed against a foreign contempt judgment and resulting sanctions, registered for enforcement in this district pursuant to 28 U.S.C. § 1962, properly considered by this Court?

In this case, absolutely not!

I. Factual Background

On August 26, 1982, Manville Corporation and certain affiliated entities ("Manville") filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. On August 22, 1986, Manville proposed the Second Amended and Restated Plan of Reorganization (the "Plan") which created the Manville Personal Injury Settlement Trust (the "Trust"). The Trust was created for the payment of all asbestos related claims incurred by Manville.

Shortly after the Trust's establishment, it experienced substantial asset shortages due to escalating litigation costs including associated attorney's fees. On July 20, 1990, the reference of the Manville bankruptcy to the Bankruptcy Court for the Southern District of New York was partially withdrawn pursuant to 28 U.S.C. § 157(d) and United States District Judge Jack B. Weinstein, of the Eastern District of New York, was granted supervisory responsibility over the Plan to protect the Trust's assets and prevent further frustration of the Plan. Soon thereafter, the district courts for the Eastern and Southern Districts of New York, and the bankruptcy court for the Southern District of New York (the "Courts"), entered a temporary stay of payments from, and a stay on the enforceability of, judgments and settlements against, the Trust pending revision of its operations.

On November 19, 1990, certain claimants of the Trust filed in the Courts a class action (the "Findley Class Action") against the Trust's trustees to compel them to revise the Trust's obligations and payment procedures. The Findley Class Action was assigned to Judge Weinstein and was consolidated with the bankruptcy proceedings before the Courts.

In an order issued on November 23, 1990, following a show cause hearing, the Courts: (1) conditionally certified the Findley Class Action and appointed representative counsel; and (2)

enjoined all pending litigation against the Trust to halt further dissipation of the Trust's assets during the pendency of the Findley Class Action. In subsequent contempt proceedings against Attorney James Walker held before Judge Weinstein, Walker was found to have received a copy of the Courts' November 23, 1990 order enjoining actions against the Trust. Attorney Walker does not contest this finding.

On June 14, 1990, the Illinois Circuit Court for McLean County entered judgments in favor of the Plaintiffs and against the Trust in *Handley v. Manville Corp. Asbestos Disease Compensation Fund,* No. 80-L-93 (Ill. Cir. Ct., McLean Co.) and *Betts v. Manville Corp. Asbestos Disease Compensation Fund,* No. 79-L-147 (Ill. Cir. Ct., McLean Co.). Walker was the attorney for the claimants in both state actions. On December 31, 1990, in violation of the Courts' November 23 order enjoining all actions against the Trust, Walker caused Citations to Discover Assets to be issued to Bankers Trust Company ("Bankers Trust"), custodian of the Trust's assets, in an effort to enforce the Betts and Handley judgments.

On February 13, 1991, the Courts entered an order and partial judgment certifying a non-opt-out class pursuant to Federal Rule of Civil Procedure 23(b)(1)(B) consisting of all trust claimants. Pursuant to that order, the Courts stayed "execution or other enforcement of judgments against the Trust and/or its assets . . ." and "negotiating settlements or from taking any action in connection with claims pending or hereafter commenced against the Trust." In later contempt proceedings against Walker, Judge Weinstein found that Walker received notice of the Courts' order of February 13 and that he knew it enjoined him from actions against the Trust. Again, Warner does not contest that finding.

On February 25, 1991, in the Illinois Circuit Court for McLean County, Walker obtained ex parte judgments against Bankers Trust in the amount of $3,118,511.57. On March 27, 1991,

Walker caused garnishment summons to issue to five Chicago banks to enforce the Bankers Trust judgments.

On April 19, 1991, upon the Trust's and Bankers Trust's application, the Courts entered an order directing Walker to appear on April 23, 1991, and show cause why he should not be held in contempt for his actions in violation of the Courts' orders of November 23, 1990 and February 13, 1991. Walker was served by both facsimile transmission and personal service on April 19, 1991. Following Walker's failure to appear, Judge Weinstein found Walker in civil contempt on April 24, 1991. In its order of contempt, the Courts referred to United States Magistrate Judge John L. Caden the issue of appropriate sanctions.

On May 13, 1991, Magistrate Judge Caden awarded to the Trust $52,085.30 in attorneys' fees and expenses associated with Walker's contemptuous behavior. On June 10, 1991, Magistrate Judge Caden assessed against Walker an additional $7,000 in sanctions and $22,569.71 in attorneys' fees and expenses. Both awards included the calculation of interest thereon at a rate of 6.07 and 6.09 percent respectively.

On October 21, 1991, the judgment entered against Walker was registered in this district pursuant to 28 U.S.C. § 1963. On that same day, a Citation to Discover Assets issued against Walker upon the application of the Trust. On November 18, 1991, Walker filed with this Court a motion for an order quashing the Citation to Discover Assets, for a dismissal of the supplementary proceedings and for a determination that the registered judgment is void pursuant to Federal Rules of Civil Procedure 12(b), 60(b)(4) and 69. That motion is currently before the Court.

II. Arguments Advanced by Walker

In support of his motion, Walker advances the following five arguments.

I. As to both Walker and the Plaintiffs in the *Handley* and *Betts* state actions, the Courts' orders of November 23, 1990, and February 13, 1991 are void for lack of subject matter jurisdiction.

II. That those same orders are void for lack of personal jurisdiction.

III. That those same orders violate 28 U.S.C. § 2283 (the "Anti-Injunction Act").

IV. That the September 3, 1991, Judgment upon Decision of Court is invalid due to Walker's failure to consent to those proceedings before Magistrate Judge Caden pursuant to 28 U.S.C. § 636(c).

V. That the Citation to Discover Assets is invalid due to its failure to conform to the requirements of Illinois Supreme Court Rule 277(e).

III. Analysis

A. Arguments I, II, III, and IV

Before this Court is Walker's motion in opposition to the enforcement of a foreign judgment registered in this district pursuant to 28 U.S.C. § 1963. The propriety of this Court's review of that motion—an issue addressed by neither party—is first examined.

Title 28 U.S.C. § 1963 provides in relevant part:

A judgment in an action for the recovery of money or property entered in any district court . . . may be registered by filing a certified copy of such judgment in any other district . . . when the judgment has become final by appeal or expiration of the time for appeal or when ordered by the court that entered the judgment for good cause shown. . . . A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

Usually, it is more convenient for motions for relief from a judgment to be addressed to the rendering court.

The rendering court ordinarily will be far more familiar with the case and with the circumstances that are said to provide grounds for relief from the judgment. Accordingly it is appropriate for the court in the district of registration to decline to pass on the motion for relief and to require the moving party to proceed in the court that gave the judgment.

11 Wright and Miller, Federal Practice and Procedure: Civil § 2865 (1973) (footnote omitted).

The court in *United States v. Fluor Corp.*, 436 F.2d 383 (2nd Cir. 1970), while noting that the powers of a district court to grant relief against a judgment registered pursuant to 28 U.S.C. § 1963 were not clearly established, observed that there could be little viable support for the notion that "the court of registration lacks discretion in appropriate circumstances to refer the parties to the court which rendered judgment." *Id.* at 385.

Relying on Fluor, the court in *Fuhrman v. Livaditis*, 611 F.2d 203 (7th Cir. 1979), identified the principles controlling a registering court's decision to review the judgment of a rendering court. The *Fuhrman* court held that:

In discussions of this issue [the review of judgments by the registering court], two major policy considerations are often voiced: (1) comity among the federal district courts is furthered if the registering court refers the question of relief from judgment to the court which ordinarily entered the judgment; (2) efficient judicial administration is furthered if the registering court defers to the original court, which is likely to be more familiar with the issues raised by the motion for relief from judgment. *Id.* at 205. Here, both judicial comity and the pursuit of efficient judicial administration dictate that Walker's opposition to the enforcement of judgment based on subject matter jurisdiction, personal jurisdiction, the restrictions of the Anti-Injunction Act and the actions of Magistrate Judge Caden be referred to the rendering Courts for review.

"In general, [the] principle of 'comity' is that courts of one state or jurisdiction will give effect to [the] laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect. Black's Law Dictionary 242 (5th ed. 1979). "Comity among the district courts would obviously be furthered if these issues [issues raised in opposition to the judgment of the rendering court] were referred back to the court which originally considered them. *Fluor*, 436 F.2d at 385.

Contempt of court is "any act which is calculated to embarrass, hinder, or obstruct [the] court in [its] administration of justice, or which is calculated to lessen its authority or its dignity. Black's Law Dictionary 288 (5th ed. 1979). In the instant case, Walker seeks to oppose, in a foreign jurisdiction, the consequences of behavior which the rendering Courts found sufficient to warrant a finding of contempt and the imposition of significant sanctions. This Court finds that in the absence of glaring irregularities, comity demands that it respect such a decision.

Equally compelling is the readily apparent fact that the rendering Courts have previously and thoroughly addressed the issues raised by Walker. In both *In re Joint Eastern and Southern Districts Asbestos Litig.* 120 Bankr. 648 (E. & S.D.N.Y. 1990) ("Manville I") and *In re Joint Eastern and Southern Districts Asbestos Litig.* 129 Bankr. 710 (E. & S.D.N.Y. 1991) ("Manville II") the rendering Courts painstakingly reviewed the effect of the Anti-Injunction Act on the enjoining of state court actions (Manville I at 655), whether the Courts had subject matter jurisdiction to resolve the controversy (Manville II at 778) and "the court's jurisdiction over non-resident class members Manville II at 796. In addition, since July 20, 1990, the rendering Courts have striven to protect the interests of current and potential asbestos litigation claimants, to oversee the restructuring of the Trust and to handle the certification of the Findley class action. The above cited exhaustive opinions and the duration of the Courts' extensive

involvement with this mailer demonstrate an expertise with the issues raised by Walker which this Court would by loath to squander.

B. Argument V

Federal Rule of Civil Procedure 69(a) provides in relevant part:

The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought. . . .

Illinois Supreme Court Rule 277(e) states that:

The examination of the judgment debtor, third party, or other witnesses shall be before the court, or, if the court so orders, before an officer authorized to administer oaths designated by the court, unless the judgment creditor elects, by so indicating in the citation or subpoena served or by requesting the court to so order, to conduct all or a part of the hearing by deposition as provided by the rules of this court for discovery depositions.

Walker argues that because the Citation to Discover Assets served on him fails to expressly indicate that the hearing would be conducted as provided by the rules governing depositions that it fails to conform to Rule 277(e) and is therefore void. Walker's argument is without merit.

Walker fails to cite, and this Court is unaware of, any authority in support of his position. It is clear from the face of the citation that the hearing would occur in accordance with the rules governing depositions and accordingly the Court rejects Walker's position.

IV. Conclusion

Ergo, for the reasons noted above, Walker's motion to quash the Citation to Discover Assets, for the dismissal of the supplementary proceedings and for a determination that the registered judgment is void is DENIED WITHOUT PREJUDICE WITH LEAVE TO REFILE as to arguments I, II, III and IV before the rendering Courts, and DENIED WITH PREJUDICE as to argument V.

The enforcement of the judgment with the interest thereon will henceforth proceed expeditiously. See *Pacific Reinsurance Management Corp. v. Fabe* 929 F.2d 1215 (7th Cir. 1991). The examination of Walker pursuant to the Citation to Discover Assets, issued upon the application of the Trust, will occur on September 24, 1992, at 9:00 a.m. before United States Magistrate Judge Charles Evans of this Court.

ENTER: 26 August, 1992

FOR THE COURT:

RICHARD MILLS
United States District Judge

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS

In re JOINT EASTERN AND SOUTHERN DISTRICTS ASBESTOS LITIGATION In re JOHNS-MANVILLE CORPORATION *et al.* *Debtors.* BERNADINE K. FINDLEY, as Executrix of the Estate of HILLIARD FINDLEY, *et al.* *Plaintiffs,* -against- DONALD M. BLINKEN, *et al.* *Defendants.*	No. S-91-66

AFFIDAVIT

James Walker, on oath, states as follows:

1. He is an attorney licensed to practice law within the state of Illinois and in certain federal courts, including the Central District of Illinois.

2. He is the attorney of record for those individuals who are Plaintiffs in the cases of *Handley* v. *Unarco Industries, Inc.*, No. 80 L 93, Circuit Court of McLean County, and *Betts* v. *Unarco Industries, Inc.*, No. 79 L 147, Circuit Court of McLean County.

3. Certain of the Plaintiffs in *Handley* and *Betts* obtained judgments against the Manville Personal Injury Settlement Trust as the result of a jury trial in the Circuit Court of McLean County in June, 1990. The judgments were entered on June 14, 1990.

4. Manville Personal Injury Settlement Trust appealed from the judgments entered in favor of certain Plaintiffs and against the Trust. The appeal presently pends in the Fourth District Appellate Court.

Manville Personal Injury Settlement Trust filed no security for the judgments with either the Circuit Court of McLean County or the Fourth District Appellate Court.

5. None of the Plaintiffs represented by James Walker, or the law firm of James Walker, Ltd., were ever parties to, filed any appearance in, or were served with any summons, at any time, in any proceeding before Judge Jack Weinstein, U.S. District Court judge for the Eastern District of New York.

6. None of the Plaintiffs in *Handley* and *Betts* were ever served with any summons in any class action case involving Manville Personal Injury Settlement Trust initiated in the Eastern District of New York.

7. None of the judgment holders in *Handley* and *Betts* received notice of any proceedings in New York between the filing of the class action complaint on November 19, 1990, and the issuance of an order allegedly enjoining them on November 23, 1990, in *Findley* v. *Blinken.*

8. Affiant has never been served with summons in the class action proceeding of *Findley* v. *Blinken,* at any time.

9. Affiant has never been served with any summons issued by the courts of New York in any case connected with the Manville Personal Injury Settlement Trust, Judge Jack Weinstein, or Magistrate Caden.

10. None of the affiant's clients have ever appeared in, or ever requested any relief in, *Findley* v. *Blinken.*

11. Affiant has never appeared on behalf of himself, or any individual, before Judge Weinstein or Magistrate Caden.

12. Affiant has never consented, or been requested to consent, to Magistrate Caden hearing any matter, issue, or dispute.

13. Affiant has never committed a tort within the state of New York, nor committed any act within the state of New York which constitutes the basis for a contempt proceeding, or submission to the jurisdiction of New York courts.

14. Affiant has never taken any action within the state of New York to collect any judgments on behalf of affiant's clients against Manville Personal Injury Settlement Trust.

FURTHER AFFIANT SAYETH NOT

/s/ JAMES WALKER

Subscribed and sworn to before me
this 15th day of November, 1991.
/s/ EVA J. CICCI

"Official Seal"
Eva J. Cicci
Notary Public, State of Illinois
My Commission Expires 2/2/94

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action File No. 90 CV 3973

BERNADINE K. FINDLEY, AS EXECUTRIX OF THE ESTATE OF HILLIARD FINDLEY, ETAL.
vs.
DONALD M. BLINKEN ETAL.

JUDGMENT
S-91-66

CERTIFICATION OF JUDGMENT FOR REGISTRATION IN ANOTHER DISTRICT

I, Robert C. Heinemann, Clerk of the United States District Court for the Eastern District of New York, do hereby certify the annexed to be a true and correct copy of the original judgment entered in the above entitled action on September 3, 1991, as it appears of record in my office, and that

*NO NOTICE OF APPEAL FROM THE SAID JUDGMENT HAS BEEN FILED IN MY OFFICE AND THE TIME FOR THE APPEAL COMMENCED TO RUN ON SEPTEMBER 3, 1991 UPON ENTRY OF THE JUDGMENT.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the said Court this 2nd day of October, 1991

ROBERT C. HEINEMANN
Clerk

By: /s/ JEFFREY HOWELL
Deputy Clerk

*When no notice of appeal from the judgment has been filed, insert "no notice of appeal from the said judgment has been filed in my office and the time for appeal commenced to run on [insert date] upon the entry of [If no motion of the character described in Rule 73(a) F.R.C.P. was filed, here insert 'the judgment', otherwise describe the nature of the order from the entry of which time for appeal is computed under that rule.] If an appeal was taken, insert "a notice of appeal from the said judgment was filed in my office on [insert date] and the judgment was affirmed by mandate of the Court of Appeals issued [insert date]" or "a notice of appeal from the said judgment was filed in my office on [insert date] and the appeal was dismissed by the [insert 'Court of Appeals' or 'District Court'] on [insert date]", as the case may be.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
NEW YORK and
SOUTHERN DISTRICT OF
NEW YORK

In re JOINT EASTERN AND
SOUTHERN DISTRICTS ASBESTOS
LITIGATION

UNITED STATES BANKRUPTCY
COURT
SOUTHERN DISTRICT OF
NEW YORK

In re JOHNS-MANVILLE
CORPORATION, *et al.*

Debtors.

BERNADINE K. FINDLEY, as
Executrix of the Estate of
HILLIARD FINDLEY, *et al*

Plaintiffs,

against

DONALD M. BLINKEN, *et al*

Defendants.

NYAL
Index No. 40000
S-91-66

In Proceedings for
A Reorganization
Under Chapter 11.
Case Nos.
82B 11656 (BRL)
through
82B 11676 (BRL)
Inclusive

C.A. No. 90-3973
(E.D.N.Y.)
C.A. No. 90-7158
(S.D.N.Y.)

JUDGMENT OF CIVIL CONTEMPT OF JAMES WALKER

This hearing on an Order to Show Cause came on before the Court, Honorable Jack B. Weinstein, District Judge, presiding, and the Court having read the pleadings of the parties and the issues having been heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED

That the Respondent, James Walker ("Walker"), has previously received copies of the Court's Orders dated November 23,

1990 and February 13, 1991 and knew that they restrained him from instituting and pursing any execution or enforcement of judgment actions against the Trust and/or its assets.

The Court issued an Order to Show Cause on April 19, 1991 which was returnable at 9:30 a.m. on April 23, 1991. The Court finds that Walker was served with copies of the Order to Show Cause personally, via telecopier, and by overnight mail. On April 23, 1991, the Court held a hearing on this matter at which Walker did not appear.

The institution of the citation action in *Handley v. Manville Personal Injury Settlement Trust*, No. 80 L 93 (Ill. Cir. Ct., McLean County) and *Betts v. Manville Personal Injury Settlement Trust*, No. 79 L 147 (Ill. Cir. Ct., McLean County) (the "Actions") against Bankers Trust Company violates this Court's Orders dated November 23, 1990 and February 13, 1991 and the stays set forth therein.

As a result, Walker is in civil contempt for knowingly violating this Court's November 23, 1990 and February 13, 1991 Orders, which stayed execution or enforcement of judgment actions against the Trust and/or its assets. Walker has been ordered by this Court to immediately dismiss the citation actions against Bankers Trust Company in the Actions. Walker has also been ordered to immediately take all necessary steps to have the *ex parte* judgments entered against Bankers Trust Company in the Actions vacated and to have them and all other actions taken against Bankers Trust Company in the Action, including the garnishment summonses issued to Chase Manhattan Bank, Continental Bank, LaSalle National Bank, Harris Trust and Savings Bank and First National Bank of Chicago, declared null and void. Walker has also been ordered to serve both the Trust and Bankers Trust Company with copies of any motions to vacate and any orders vacating the aforesaid judgments, and with copies of any motions to dismiss the citation actions and withdraw the garnish-

ment summonses and any orders dismissing the citation actions and withdrawing the garnishment summonses.

With respect to sanctions, this matter has been referred to the Honorable John L. Caden, United States Magistrate, to determine whether sanctions, if any, should be imposed against Walker and, if so, in what amount. The Magistrate has also been asked to determine, *inter alia*, whether further sanctions should be imposed if Walker fails to obey this Court's Order.

Dated at Brooklyn, New York, this 24th day of April, 1991.

/s/ J. ROBERT C. HEINEMANN

Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
NEW YORK and
SOUTHERN DISTRICT OF
NEW YORK

In re JOINT EASTERN AND
SOUTHERN DISTRICTS
ASBESTOS LITIGATION

UNITED STATES BANKRUPTCY
COURT
SOUTHERN DISTRICT OF
NEW YORK

In re JOHNS-MANVILLE
CORPORATION, *et al.*

Debtors.

BERNADINE K. FINDLEY, as
Executrix of the Estate of
HILLIARD FINDLEY, *et al*

Plaintiffs,

against

DONALD M. BLINKEN, *et al*

Defendants.

FILED
In Clerk's Office
U.S. District Court
E.D.N.Y.
Sep. 3, 1991
Time: A.M.
P.M.

NYAL
Index No. 40000

S-91-66

In Proceedings for
A Reorganization
Under Chapter 11.
Case Nos. 82B 11656
(BRL) through
82B 11676 (BRL)
Inclusive

C.A. No. 90-3973
(E.D.N.Y.)
C.A. No. 90-7158
(S.D.N.Y.)

JUDGMENT ON DECISION BY THE COURT

This action came on for hearing before the Court, the Honorable John L. Caden, United States Magistrate Judge, presiding, and the issues having been duly heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED that Manville Personal Injury Settlement Trust recover of James B. Walker the sum of $52,085.30 pursuant to Order dated May 13, 1991 (attached hereto as Exhibit A) with interest thereon at the rate of 6.07

percent from May 13, 1991, and the sum of $29,569.71 pursuant to Order dated June 10, 1991 (attached hereto as Exhibit B) with interest thereon at the rate of 6.09 percent from June 10, 1991.

Dated at Brooklyn, New York, this 30th day of August, 1991.

/s/ ROBERT C. HEINEMANN

Clerk of Court

A TRUE COPY
DATED OCT 02, 1991
Robert C. Heinemann
by /s/ Jeffrey Howell
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK and
SOUTHERN DISTRICT OF NEW YORK

In re JOINT EASTERN AND SOUTHERN DISTRICTS ASBESTOS LITIGATION

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF NEW YORK

In re JOHNS-MANVILLE CORPORATION, *et al.*

Debtors.

BERNADINE K. FINDLEY, as Executrix of the Estate of HILLIARD FINDLEY, *et al*

Plaintiffs,

against

DONALD M. BLINKEN, et al

Defendants.

NYAL
Index No. 40000

In Proceedings for A Reorganization Under Chapter 11. Case Nos. 82B 11656 (BRL) through 82B 11676 (BRL) Inclusive

C.A. No. 90-3973 (E.D.N.Y.)
C.A. No. 90-7158 (S.D.N.Y.)

ORDER

THIS MATTER came before the Court on the Memorandum of the Manville Personal Injury Settlement Trust (the Trust) in support of the award of attorneys' fees and costs incurred by the Trust and Bankers Trust Company in connection with the civil contempt proceedings against James Walker. Pursuant to a Master Custodian Agreement, the Trust must indemnify Bankers Trust Company for its attorneys' fees and costs incurred herein.

This Court held a hearing in this matter on April 29, 1991 at which time the Court found, *inter alia*, that Walker was previ-

ously served with copies of Judge Weinstein's April 24, 1991 Order, the Judgment of Civil Contempt of James Walker, together with the April 23, 1991 Transcript of Proceedings before Judge Weinstein, as well as the Notice of the April 29, 1991 Hearing before this Court, such service being accomplished personally, by telecopier, and by overnight mail.

On April 30, 1991, this Court ordered that Walker be assessed a fine of $1,000 per day for each day he continues not to comply with Judge Weinstein's April 24, 1991 Order, the fine to begin after service of this Court's April 30 Order is made upon Walker by telecopier, overnight mail or by personal service. The Court further ordered that by May 7, 1991, written submissions, including supporting affidavits, should be filed and served on Walker setting forth the Costs, expenses and attorneys' fees which the Trust and Bankers Trust Company had incurred as a result of Walker's contemptuous conduct herein. The Court also ordered that written submissions be filed by May 7, 1991 setting forth whether this Court should refer the finding of contempt and the proceedings and record herein to the Illinois Attorney Registration and Disciplinary Commission.

The Court has reviewed the Memorandum filed by the Trust together with the attached exhibits. These exhibits include an Affidavit by the Trust General Counsel reflecting Trust attorney fee time and costs in the amount of $4,014 and $690.00 respectively. The exhibits also include an Affidavit by Stephen E. Frankel, Esq., an attorney retained by the Trust and Bankers Trust Company in support of legal fees in the amount of $43,154.50 and expenses in the amount of $4,226.80 for fees and expenses of Mr. Frankel's law firm, another law firm retained by Bankers Trust Company, and the in-house attorneys' fees of Bankers Trust Company.

Pursuant to the Master Custodian Agreement between the Trust and Bankers Trust Company, the Trust is required to in-

demnify Bankers Trust Company for all attorneys' fees and expenses incurred pursuant to the Master Custodian Agreement.

The Austern and Frankel Affidavits itemize the attorney time and costs incurred.

Based on the foregoing, the Court awards attorneys' fees and costs to the Trust in the total amount of $47,168.50 (attorneys fees) and $4,916.80 (costs), and directs the Trust to submit to this Court on or before May 31, 1991, an additional application, with supporting affidavits, for any additional attorneys' fees and costs incurred in connection with this matter after April 24, 1991.

In addition, the Court directs that the Trust forward the entire record in this matter, including this Order, to the Illinois Attorney Registration and Disciplinary Commission for such action as the Commission may deem appropriate.

Dated: May 13, 1991
Brooklyn, New York

/s/ JOHN CADEN

United States Magistrate Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK and
SOUTHERN DISTRICT OF NEW YORK

In re JOINT EASTERN AND SOUTHERN DISTRICTS ASBESTOS LITIGATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
In re JOHNS-MANVILLE CORPORATION, *et al.*

Debtors.

BERNADINE K. FINDLEY, as Executrix of the Estate of HILLIARD FINDLEY, *et al*

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NYAL
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S-91-66

In Proceedings for A Reorganization Under Chapter 11.
Case Nos.
82B 11656 (BRL)
through
82B 11676 (BRL)
Inclusive

C.A. No. 90-3973 (E.D.N.Y.)
C.A. No. 90-7158 (S.D.N.Y.)

ORDER

This matter came before the Court on the Memorandum of the Manville Personal Injury Settlement Trust (the "Trust") in support of the award of attorneys' fees and costs incurred by the Trust in connection with the civil contempt proceedings against James Walker (Walker).

Pursuant to this Court's May 13, 1991 Order, the Trust was awarded attorneys' fees and costs in the total amount of $52,085.30 in connection with the civil contempt of Walker. The

Trust was directed to submit to the Court an Affidavit concerning attorneys' fees and costs incurred after April 24, 1991. Pursuant to the Affidavit of May 24, 1991, signed by Steven H. Frankel, Esq., a copy of which was submitted with the Memorandum of the Trust in support of this Order and which itemizes the attorney fees and costs incurred by the Trust since April 24, 1991 (except for three hours which were inadvertently not billed on prior statements), the Court has determined that the Trust has incurred additional attorneys' fees in the amount of $18,504.00 and additional costs in the amount of $4,065.71 after April 24, 1991 in connection with the Walker civil contempt.

Based on the foregoing, the Court awards attorneys' fees and costs (in addition to the attorneys' fees and costs awarded pursuant to this Court's Order of May 13, 1991) in the additional amount of $18,504.00 in attorneys fees and in the additional amount of $4,065.71 in costs. Therefore, the total awards to the Trust pursuant to this Order and the Order of May 13, 1991 for attorneys' fees is $65,672.50 and for costs is $8,[illegible]82.51.

In addition, the Trust has submitted a Certificate of Service of Steven H. Frankel, Esq., reflecting that on April 30, 1991, he sent by telecopier and by Federal Express a copy of this Court's April 30, 1991 Order assessing a fine against Walker in the amount of $1,000 per day for each day he continued not to comply with Judge Jack B. Weinstein's April 24, 1991 Order. Judge Weinstein's Order directed Walker to dismiss certain judgments against Bankers Trust Company. The fine against Walker was to begin after service of this Court's April 30, 1991 Order was made upon Walker by telecopier, overnight mail or by personal service. The Trust has also submitted Orders showing that the judgments referred to in this paragraph were in fact dismissed on May 7, 1991. (The Trust has represented that Walker opposed the motions of dismissal filed by Bankers Trust Company.)

Therefore, Walker is hereby assessed a fine of $7,000 for seven days (May 1 through May 7, 1991) that he failed to comply with this Court's Order of May 13, 1991.

Dated: June 10, 1991
Brooklyn, New York

/s/ JOHN CADEN

United States Magistrate Judge

United States Constitution

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls; —to all Cases of admiralty and maritime Jurisdiction; —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury, and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

United States Code Annotated

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART III. COURT OFFICERS AND EMPLOYEES
CHAPTER 43. UNITED STATES MAGISTRATES

28 USCS § 636 (1995)

§ 636. Jurisdiction, powers, and temporary assignment

(a) Each United States magistrate serving under this chapter [28 USCS § 631 et seq.] shall have within the territorial jurisdiction prescribed by his appointment—

(1) all powers and duties conferred or imposed upon United States commissioners by law or by the Rules of Criminal Procedure [USCS FRCP] for the United States District Courts;

(2) the power to administer oaths and affirmations, issue orders pursuant to section 3142 of title 18 [18 USCS § 3142] concerning release or detention of persons pending trial, and take acknowledgments, affidavits, and depositions;

(3) the power to conduct trials under section 3401, title 18, United States Code [18 USCS § 3401], in conformity with and subject to the limitations of that section, and

(4) the power to enter a sentence for a misdemeanor or infraction with the consent of the parties.

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

(2) A judge may designate a magistrate to serve as a special master pursuant to the applicable provisions of this title [28 USCS §§ 1 et seq.] and the Federal Rules of Civil Procedure for the United States district courts. A judge may designate a magistrate to serve as a special master in any civil case, upon consent of the parties, without regard to the provisions of rule 53(b) of the Federal Rules of Civil Procedure for the United States district courts [USCS FRCP Rule 53(b)].

(3) A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States.

(4) Each district court shall establish rules pursuant to which the magistrates shall discharge their duties.

(c) Notwithstanding any provision of law to the ccontrary—

(1) Upon the consent of the parties, a full--time United States magistrate or a part-time United Statees magistrate who serves as a full-time judicial officer may conduct any or all proceedings in a jury or nonjury civil matteer and order the entry of judgment in the case, when speciall̈y designated to exercise such jurisdiction by the district couurt or courts he serves. Upon the consent of the parties, pursuant to their specific written request, any other part-time maagistrate may exercise such jurisdiction, if such magistrate meets the bar membership requirements set forth in section 6631(b)(1) [28 USCS § 631(b)(1)] and the chief judge of the ddistrict court certifies that a full-time magistrate is not reasoonably available in accordance with guidelines established byy the judicial council of the circuit. When there is more than ‹ one judge of a district court, designation under this paragraphh shall be by the concurrence of a majority of all the judges ‹ of such district court, and when there is no such concurreence, then by the chief judge.

(2) If a magistrate is designated to exercise civil jurisdiction under paragraph (1) of this subsection, the clerk of court shall, at the time the action is filed, notify the pearties of the availability of a magistrate to exercise such jurisdiction. The decision of the parties shall be communicated to › the clerk of court. Thereafter, either the district court judge ‹ or the magistrate may again advise the parties of the availaability of the magistrate, but in so doing, shall also advise the › parties that they are free to withhold consent without adverse substantive consequences. Rules of court for the refereence of civil matters to magistrates shall include proceduress to protect the voluntariness of the parties' consent.

(3) Upon entry of judgment in any case refeerred under paragraph (1) of this subsection, an aggrieved | party may appeal directly to the appropriate United Statees court of appeals from the judgment of the magistrate iin the same manner as an appeal from any other judgment oof a district court. In this circumstance, the consent of the paarties allows a magistrate designated to exercise civil jurisdiction under paragraph (1) of this subsection to direct the entry of a judg-

ment of the district court in accordance with the Federal Rules of Civil Procedure [USCS FRCP]. Nothing in this paragraph shall be construed as a limitation of any party's right to seek review by the Supreme Court of the United States.

(4) Notwithstanding the provisions of paragraph (3) of this subsection, at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court in the same manner as on an appeal from a judgment of the district court to a court of appeals. Wherever possible the local rules of the district court and the rules promulgated by the conference shall endeavor to make such appeal inexpensive. The district court may affirm, reverse, modify, or remand the magistrate's judgment.

(5) Cases in the district courts under paragraph (4) of this subsection may be reviewed by the appropriate United States court of appeals upon petition for leave to appeal by a party stating specific objections to the judgment. Nothing in this paragraph shall be construed to be a limitation on any party's right to seek review by the Supreme Court of the United States.

(6) The court may, for good cause shown on its own motion, or under extraordinary circumstances shown by any party, vacate a reference of a civil matter to a magistrate under this subsection.

(7) The magistrate shall, subject to guidelines of the Judicial Conference, determine whether the record taken pursuant to this section shall be taken by electronic sound recording, by a court reporter, or by other means.

(d) The practice and procedure for the trial of cases before officers serving under this chapter [28 USCS §§ 631 et seq.], and for the taking and hearing of appeals to the district courts, shall conform to rules promulgated by the Supreme Court pursuant to section 2072 of this title.

(e) In a proceeding before a magistrate, any of the following acts or conduct shall constitute a contempt of the district court

for the district wherein the magistrate is sitting: (1) disobedience or resistance to any lawful order, process, or writ; (2) misbehavior at a hearing or other proceeding, or so near the place thereof as to obstruct the same; (3) failure to produce, after having been ordered to do so, any pertinent document; (4) refusal to appear after having been subpenaed or, upon appearing, refusal to take the oath or affirmation as a witness, or, having taken the oath or affirmation, refusal to be examined according to law; or (5) any other act or conduct which if committed before a judge of the district court would constitute contempt of such court. Upon the commission of any such act or conduct, the magistrate shall forthwith certify the facts to a judge of the district court and may serve or cause to be served upon any person whose behavior is brought into question under this section an order requiring such person to appear before a judge of that court upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. A judge of the district court shall thereupon, in a summary manner, hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a judge of the court, or commit such person upon the conditions applicable in the case of defiance of the process of the district court or misconduct in the presence of a judge of that court.

(f) In an emergency and upon the concurrence of the chief judges of the districts involved, a United States magistrate may be temporarily assigned to perform any of the duties specified in subsection (a) or (b) of this section in a judicial district other than the judicial district for which he has been appointed. No magistrate shall perform any of such duties in a district to which he has been temporarily assigned until an order has been issued by the chief judge of such district specifying (1) the emergency by reason of which he has been transferred, (2) the duration of his assignment, and (3) the duties which he is authorized to perform.

A magistrate so assigned shall not be entitled to additional compensation but shall be reimbursed for actual and necessary expenses incurred in the performance of his duties in accordance with section 635 [28 USCS § 635].

(g) A United States magistrate may perform the verification function required by section 4107 of title 18, United States Code [18 USCS § 4107]. A magistrate may be assigned by a judge of any United States district court to perform the verification required by section 4108 [18 USCS § 4108] and the appointment of counsel authorized by section 4109 of title 18, United States Code [18 USCS § 4109], and may perform such functions beyond the territorial limits of the United States. A magistrate assigned such functions shall have no authority to perform any other function within the territory of a foreign country.

(h) A United States magistrate who has retired may, upon the consent of the chief judge of the district involved, be recalled to serve as a magistrate in any judicial district by the judicial council of the circuit within which such district is located. Upon recall, a magistrate may receive a salary for such service in accordance with regulations promulgated by the Judicial Conference, subject to the restrictions on the payment of an annuity set forth in section 377 of this title or in subchapter III of chapter 83, and chapter 84, of title 5 [5 USCS §§ 8331 et seq., 8401 et seq.] which are applicable to such magistrate. The requirements set forth in subsections (a), (b)(3), and (d) of section 631, and paragraph (1) of subsection (b) of such section to the extent such paragraph requires membership of the bar of the location in which an individual is to serve as a magistrate, shall not apply to the recall of a retired magistrate under this subsection or section 375 of this title. Any other requirement set forth in section 631(b) shall apply to the recall of a retired magistrate under this subsection or section 375 of this title unless such retired magistrate met such requirement upon appointment or reappointment as a magistrate under section 631.

Federal Rules of Civil Procedure

RULE 72. Magistrate Judges; Pretrial Orders

(a) Nondispositive Matters. A magistrate judge to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. Within 10 days after being served with a copy of the magistrate judge's order, a party may serve and file objections to the order; a party may not thereafter assign as error a defect in the magistrate judge's order to which objection was not timely made. The district judge to whom the case is assigned shall consider such objections and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law.

(b) Dispositive Motions and Prisoner Petitions. A magistrate judge assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate judge, and a record may be made of such other proceedings as the magistrate judge deems necessary. The magistrate judge shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate judge deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A

party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

HISTORY: (Added Aug. 1, 1983.)
(Amended Dec. 1, 1991; Dec. 1, 1993.)

RULE 73. Magistrate Judges; Trial by Consent and Appeal Options

(a) Powers; Procedure. When specially designated to exercise such jurisdiction by local rule or order of the district court and when all parties consent thereto, a magistrate judge may exercise the authority provided by Title 28, U.S.C. § 636(c) and may conduct any or all proceedings, including a jury or nonjury trial, in a civil case. A record of the proceedings shall be made in accordance with the requirements of Title 28, U.S.C. § 636(c)(7).

(b) Consent. When a magistrate judge has been designated to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. § 636(c). If, within the period specified by local rule, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election.

A district judge, magistrate judge, or other court official may again advise the parties of the availability of the magistrate judge, but, in so doing, shall also advise the parties that they are free to

withhold consent without adverse substantive consequences. A district judge or magistrate judge shall not be informed of a party's response to the clerk's notification, unless all parties have consented to the referral of the matter to a magistrate judge.

The district judge, for good cause shown on the judge's own initiative, or under extraordinary circumstances shown by a party, may vacate a reference of a civil matter to a magistrate judge under this subdivision.

(c) Normal Appeal Route. In accordance with Title 28, U.S.C. § 636(c)(3), unless the parties otherwise agree to the optional appeal route provided for in subdivision (d) of this rule, appeal from a judgment entered upon direction of a magistrate judge in proceedings under this rule will lie to the court of appeals as it would from a judgment of the district court.

(d) Optional Appeal Route. In accordance with Title 28, U.S.C. § 636(c)(4), at the time of reference to a magistrate judge, the parties may consent to appeal on the record to a district judge of the court and thereafter, by petition only, to the court of appeals.

HISTORY: (Added Aug. 1, 1983; Aug. 1, 1987; Dec. 1, 1993.)

Local Rules
District Court for the Northern District of Illinois

RULE 1.72. Conduct of Civil Proceedings by Magistrate Judges with Consent of Parties * * * * *

E. Entry of Consent Judgments by Magistrate Judges

A magistrate judge is authorized to enter a final judgment for a sum certain to which all the parties have consented in writing or a judgment of dismissal to which all of the parties have stipulated in writing, provided that the parties indicate their consent to the entry of the judgment by the magistrate judge either in writing or in open court at the time of the entry of the judgment.

Local Rules
District Courts for the Southern & Eastern
District of New York

RULE 8. Consent of Jurisdiction Procedure

(a) When a civil action is filed with the clerk, the clerk shall give the filing party notice of the magistrate judge's consent jurisdiction in a form approved by the court, with sufficient copies to be served with the complaint on adversary parties. A copy of such notice shall be attached to any third-party complaint served by a defendant.

(b) [Repealed]

(c) When a completed form has been filed, the clerk shall draw by lot the name of a magistrate judge, unless a magistrate judge has previously acted in the matter, and forward the consent form with the name of such magistrate judge for final approval to the judge to whom the case is assigned. When the judge has approved the transfer and returned the consent form to the magistrate judge to whom the case is assigned, the clerk shall also indicate on the file the name of the magistrate judge to whom the case has been assigned.

(d) The magistrate judge may hear and determine any and all pretrial and post-trial matters which are filed by the parties, including case-dispositive motions in a case which has been assigned upon consent of the parties.

(e) Appeals, if made to the district court from a magistrate judge's judgment, shall be heard by the judge to whom the case was originally assigned.